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# **Reinforcing Public Security Forces in Mexico: The Use of Armed Forces and Implications on Human Rights**

Master's Thesis

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## INTRODUCTION

Drug trafficking organizations have held sway in Mexico since half a century ago. Violence by the drug cartels has been a major concern in political and social context ever since. In consequence, authorities have faced the necessity to counteract criminal organizations, yet the state has been lacking credible strategies for defeating the cartels.<sup>1</sup> The first far-reaching strategy was introduced in 2006 when the newly elected President Calderón set the fight against the drug cartels as the main threat to national security and its administration's primary focus. He launched a vigorous strategy to fight the criminal organizations, known as the war on drugs. The strategy involved deploying around 50,000 combatants to perform the tasks of law enforcement to bolster weak civilian police forces.

Contrary to its goal of reducing violence, Mexico's homicide rate has more than tripled since the onset of the war on drugs.<sup>2</sup> The surging homicide rate and general feeling of insecurity have urged the authorities to rethink their approach on how to combat drug-trafficking. Extensive discussions have been taking place in the public fora in recent years on how to firmly strengthen the public security system.<sup>3</sup> To this end, several reforms are under way which aim at supporting the progress for restoring public safety, including an overhaul of the criminal justice system which was introduced since it had that far been weak and unfit for effectively dealing with strong and resilient criminal organizations. The effective implementation of such reforms, however, is time-consuming and positive results are becoming visible only gradually.

The core of Calderón's strategy involved deploying the armed forces in the tasks of law enforcement to bolster weak civilian police forces. The expected auxiliary role of the armed forces, however, soon turned into effectively replacing the civilian police causing a full-fledged militarization of law enforcement. The approval process of this disputed strategy was opaque and the decision to use the armed forces lacked solid legal grounds.<sup>4</sup> The war on drugs failed in its goal to swiftly destroy the cartels and, on the contrary, significantly intensified the confrontations

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<sup>1</sup> J. Chabat. *Combating Drugs in Mexico under Calderón: The Inevitable War*. Centro de Investigación y Docencia Económicas. pp. 1-6.

<sup>2</sup> Between 2006–2018. Official data by Mexico's National Institute of Statistics, Geography, and Information (INEGI) Accessible: [http://en.www.inegi.org.mx/app/tabulados/pxweb/inicio.html?rxid=75ada3fe-1e52-41b3-bf27-4cda26e957a7&db=Mortalidad&px=Mortalidad\\_08](http://en.www.inegi.org.mx/app/tabulados/pxweb/inicio.html?rxid=75ada3fe-1e52-41b3-bf27-4cda26e957a7&db=Mortalidad&px=Mortalidad_08)

<sup>3</sup> See, for example, M. Meyer, X. Suárez-Enríquez. *By Strengthening Military's Role in Fighting Crime, Mexico's Proposed Security Law Will Worsen Human Right Abuses and Harm Transparency*. Washington Office on Latin America, 2017.

<sup>4</sup> D. Wilkinson. *Mexico: The Militarization of Public Security*. Human Rights Watch. 05.09.2018.

between the cartels and public security forces. Another problematic consequence has been an upsurge in human rights violations against civilians committed by the members of the armed forces.

Foreseeing a key role for the armed forces in the fight against criminal organizations has been controversial. As the capability of public security forces has been limited, well-equipped combatants could be a promising resource readily available to fill the void. The ever-increasing power of drug cartels has become an extraordinary obstacle for the functioning of the society. The government has been unable to exert sovereign authority in parts of its territory, losing control to the drug cartels. In these circumstances, the use of the armed forces as an exceptional and temporary measure for defeating drug cartels has seemed a promising policy option for Mexico's administrations. Despite that, the use of the armed forces in civilian law enforcement could only be conceivable, if at all, when the scope of their action is limited by a strong legal framework.

The thesis is written at a crucial moment for the subsequent development of public security challenges in Mexico. The new federal cabinet took office in December 2018. The change of power comes at a time when violence is spiking, and so security issues are high on the agenda. Consequently, reducing violence is among the top priorities for the new administration.<sup>5</sup> While heavily criticizing the public security strategy of previous cabinet under President Peña Nieto during the election campaign<sup>6</sup>, the newly-elected President now has to come forward with his own strategy. The administration has revealed some of its initial plans, promoting the creation of a National Guard. Several elements of the new strategy, however, have received widespread criticism. Therefore, Mexico's new administration needs to take well-informed decisions on how to proceed with public security strategy to prevent repeating similar mistakes as the preceding administrations.

This thesis aims at providing legal input for the discussions over the future of the public security framework. The problem lies in the compatibility of the use of the armed forces in law enforcement with the system of protection of human rights. The objective of the thesis is to determine whether and to what extent can the use of the armed forces be legally integrated into the public security framework of Mexico to reinforce public security forces in the fight against drug-trafficking, taking into account legal obligations to uphold the system of protection of human rights.

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<sup>5</sup> B. Russel. Five Priorities for AMLO's Government. *Americas Quarterly*. 28.01.2019.

<sup>6</sup> D. Guzmán. AMLO Changes Course on Mexican Security After Record Bloodshed. *Bloomberg*. 09.08.2018.

Violence related to drug-trafficking has been a key concern in Mexican society and politics for decades. Hence, it has also earned significant attention from academia. While the focus has been on the social impact of drug-trafficking and militarization as well as on the violation of human rights, the legal considerations of the possible use of the armed forces have thus far attracted only limited attention in academia. The main legal question discussed in the academic literature pertains whether the situation in Mexico constitutes a non-international armed conflict. This thesis can be considered novel because the legal options for the use of the armed forces and the compatibility with the system of protection of human rights are considered against the background of the functioning of democratic governance. Moreover, through the examples of three representative case studies, the thesis gives a practical insight on the channels how the use of the armed forces may lead to human rights abuses. Understanding these channels is the key for designing a public security force that has necessary safeguards for the effective protection of human rights.

The object of the thesis is the use of the armed forces in civil law enforcement. Necessary information is provided in the thesis to analyze the link between the use of the armed forces in law enforcement and the potentially harming effect on the system of protection of human rights from different angles. For instance, the importance of governance structures are emphasized and concrete examples of human rights abuses are given to understand whether legal safeguards could be sufficient for matching the resources of the armed forces with the tasks and expectations of civil law enforcement. The main research questions are concerned with the system of protection of human rights in connection with the use of the armed forces in law enforcement:

- What are the legal options for the use of the armed forces and how to create legal safeguards to prevent human rights violations?
- Is the criminal justice system of Mexico adequate to prevent harming the system of protection of human rights?
- What are the main human rights violations committed by the armed forces and under which circumstances are civilians most vulnerable?

The author puts forward a hypothesis that the use of the armed forces in civil law enforcement in Mexico would be compatible with the system of protection of human rights in the presence of adequate safeguards within the public security framework, given the specific circumstances regarding the state of democracy. If this hypothesis holds, the armed forces could be used to reinforce public security forces in the fight against drug cartels in Mexico.

The focus in this thesis is on the exceptional and temporary use of the armed forces that could be conceivable in extraordinary circumstances. The current situation in Mexico seems extraordinary as civilian police do not have enough resources to effectively fight against organized criminal organizations. Allocating proper resources to law enforcement could alleviate the public security threats, whereas finding and training the personnel is likely a time-consuming process making it a long-term option. Serious threats to public security, on the other hand, require prompt solutions.

The thesis is divided into three chapters. The first chapter examines how effective different forms of governments are in safeguarding public security and protecting human rights. It is useful to clarify such interrelations to comprehend whether and how reinforcing democratic norms, practices and institutions impact the level of violence and the protection of human rights. The chapter then explores the state of democracy in Mexico which provides the basis for analyzing the legal options for the use of the armed forces within the public security framework. The chapter further discusses the role of the armed forces in the fight against the drug cartels, taking into considerations whether the situation in Mexico falls within the scope of a non-international armed conflict.

The second chapter analyzes the possible legalization of the use of the armed forces in Mexico. The legal framework concerning public security poses serious troubles for the involvement of the armed forces in civil law enforcement. These threats derive to a large extent from debatable jurisdiction between the ordinary and military justice system when the members of the armed forces are involved in violating human rights of civilians. Solving these issues and improving the quality of ordinary justice system are a precondition for the use of the armed forces. The failure of the Internal Security Law which aimed at legalizing the use of the armed forces in law enforcement is then discussed. The chapter concludes with a legal analysis of the possibilities to legalize the use of the armed forces in civil law enforcement, reflecting on initial propositions by the new cabinet about the creation of a National Guard.

The third chapter explores the actual militarization of public security in Mexico since 2006. Three cases are studied in depth in which the armed forces committed various human rights violations in their role within civil law enforcement. The cases demonstrate possible risks related to the use of the armed forces from the perspective of human rights protection. Understanding and considering these risks is essential for creating a new public security strategy that potentially involves the use of the armed forces as one of the elements.

The discussion and analysis of the first and second chapter rely to a large extent on peer-reviewed literature. The author uses international, regional and domestic human rights law and other national legal acts throughout the last two chapters for assessing the current legal framework and legal challenges of public security. The case law by the Inter-American Court of Human Rights (the Court), other sources by the Organization of American States (OAS) and the National Human Rights Commission (CNDH) are primarily used for the analysis of human rights violations in chapter III. The author also makes use of the reports of different NGOs to examine the latest developments on the creation of legal framework for the use of the armed forces in the realm of public security. Analytical method is primarily used in the thesis.

**Keywords:** security, armed forces, law enforcement, human rights, drug trafficking



## CHAPTER I. THE RELATIONSHIP BETWEEN DEMOCRATIC GOVERNANCE AND PUBLIC SECURITY

### 1.1. Democracy, Public Security and the Protection of Human Rights

This sub-chapter gives an insight on the complex link between the form of governance, security and human rights. Democracy enjoys a rather positive image because it is often associated with the core rights, such as freedom, liberty, equality, justice, basic rights and security.<sup>7</sup> The link between democracy and public security, however, is not implicit. There is in fact no mechanism *per se* in democracy that would or should prevent threats to security or human rights more generally.

Many authors have argued that democracy remains the most promising system of government for achieving peace and security. For instance, Albright *et al.*<sup>8</sup> have stated that “years of empirical research demonstrate that strong democracies not only avoid war with one another, but also have much lower levels of civil conflict, deadly terrorism, attacks against women, violent crime, and poverty.” At the same time, experiences following the Arab Spring led some authors to conclude that the transition from autocracy to democracy is a major hurdle, which often generates chaos and can tip public security into collapse.<sup>9</sup> It is, therefore, vital to explore what are the fundamental reasons that lead most researchers to believe that democracy should eventually lead to a more peaceful and secure society.

Empirical studies have indicated that data on violence and its connection with democratic states might be misinterpreted as this relationship is not linear and so the interpretation cannot be straightforward. Several authors have found evidence that the hypothesis of the inverted U-shaped curve between violence and democracy holds.<sup>10</sup> This theory suggests that the most vulnerable societies in terms of internal conflict and public security are those with hybrid regime of governance (or semi-democracies). At the same time, both strong autocracies as well as democratic

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<sup>7</sup> R. J. Dalton, D. C. Shin, W. Jou. Understanding Democracy: Data from Unlikely Places. –18(4), Journal of Democracy, 2007, pp. 143-145.

<sup>8</sup> M. Albright, *et al.* Liberal Democracy and the Path to Peace and Security. Brookings and Institute for Security Studies, 2017, pp. 1-28.

<sup>9</sup> B. Aras, E. Yorulmazlar. Mideast Geopolitics: The Struggle for a New Order. –24(2), Middle East policy, 2017, pp. 57-69.

<sup>10</sup> H. Hegre, T. Ellingsen, S. Gates, N. P. Gleditsch. Toward a democratic civil peace? Democracy, political change, and civil war, 1816–1992. –95(1), American Political Science Review, 2001, p.38, and J. D. Fearon, D. D. Laitin. Ethnicity, insurgency, and civil war. –97(1), American Political Science Review, 2003, p. 85.

regimes with strong institutions and good governance demonstrate a much stronger ability to curb violence.

A similar conclusion has been reached in human rights literature. In general, it is expected that turning the governmental system more democratic reduces the willingness and capacity of the state's authority to violate human rights.<sup>11</sup> More recent literature, however, has challenged this early hypothesis. A non-linear relationship between the level of democracy and state repression has been found instead<sup>12</sup>, similarly to the inverse-U relationship between democracy and violence. These results reveal that authorities in semi-democratic countries do not face sufficient control mechanisms that would deter them from repression. The likelihood of human rights violations will only start to decrease when democratic institutionalization establishes certain checks and balances.<sup>13</sup> Fully-fledged autocracies, on the other hand, are characterized by a lack of political opposition which results in a more enduring political stability setting and also reduces the need for immediate repressions.<sup>14</sup> Some latest research suggests that the relationship between the level of democracy and violations of human rights is even more elaborate than a non-linear inverted U-shaped curve suggests. It is found that strong democracies indeed outperform autocracies in their ability to protect human rights.<sup>15</sup> Empirical findings confirm the value of this framework for analyzing the interlinkages between democracy, security and human rights.

While the divisions between the concepts of autocracy, democracy and the middle in between are relatively easy to grasp theoretically, it is much more difficult to apply these for practical purposes. The way autocracies and democracies are described and determined is often somewhat vague. In fact, all societies can be placed somewhere along authoritarian-democratic continuum. Each of the end points of this continuum is respectively the concept of pure democracy or pure autocracy which, however, is not found in actual cases.<sup>16</sup> The societies very close to the end points can be classified as either democratic or autocratic. The societies that have both democratic as well as authoritarian characteristics are in the middle of the continuum and can be classified as semi-

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<sup>11</sup> R. A. Dahl. *Political Oppositions in Western Democracies*. Yale University Press, New Haven Connecticut, 1966.

<sup>12</sup> S. M. Mitchell, J. J. Ring, M. K. Spellman. Domestic legal traditions and states' human rights practices. –50(2), *Journal of Peace Research*, 2013, p. 199.

<sup>13</sup> C. Davenport, D. A. Armstrong II. Democracy and the Violation of Human Rights: A Statistical Analysis from 1976 to 1996. –48(3), *American Journal of Political Science*, 2004, p. 551.

<sup>14</sup> P. M. Regan, E. A. Henderson. Democracy, Threats and Political Repression in Developing Countries: Are Democracies Internally Less Violent? –23(1), *Third World Quarterly*, 2002, p. 122.

<sup>15</sup> Z. M. Jones, Y. Lupu. Is There More Violence in the Middle?. –62(3), *American Journal of Political Science*, 2018, pp. 665-666.

<sup>16</sup> J. A. Cheibub, J. Gandhi, J. R. Vreeland. Democracy and dictatorship revisited. –143(1-2), *Public choice*, 2010, p. 93.

democracies. In the context of this paper, it is especially important to comprehend which of the characteristics of each system make it resilient or vulnerable in terms of violence and protection of human rights.

Strong autocracies are able to avoid violence mainly by monopolization of the state coercive power and authority. They are often associated with strict and rules-based society, repressive methods of law enforcement and general feeling of fear.<sup>17</sup> This provides stability in the system due to the lack of opposition actively resisting the establishment. Even though the inverted U-shaped curve hypothesis suggests that autocracies perform well in terms of security, it is argued that over a longer term these systems tend to be more unstable than strong democracies. Schmitter and Karl<sup>18</sup> have reflected on this, emphasizing that democracies are not immediately more efficient, orderly, stable or socially peaceful than other forms of government, yet democracies yield a better chance of sustainably attaining those universally acclaimed public goods. The inefficiency of autocracies derives from the increase of political awareness of the society over a longer term which is inexorable in a digitally connected world.<sup>19</sup> It can be expected that if personal freedom will be limited over an extended period of time, the risk for a civil disorder intensifies.

Strong democracies, on the other hand, have a capacity of containing violence for several reasons. To remain in power, governments need to seek for support in the public which provides incentives to voluntarily cede excessive power which may otherwise lead to the violations of human rights. Furthermore, full democracies have built-in structures that enable dissenting opinions to reach into decision-making as an input that is thoroughly reflected on.<sup>20</sup> Strong systems encourage political participation by all groups of society, creating incentives to achieve their goals through peaceful means. As a result, involvement in political processes becomes a more efficient way for accomplishing desires of different societal groups than turning towards violent means. Apart from this, governments in strong democracies generally run diverse programs with a goal to reduce poverty and inequality. Some authors have suggested that in the long-run such policies also help to reduce violence as a side effect.<sup>21</sup>

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<sup>17</sup> Davenport, Armstrong II, *op. cit.*, p. 541.

<sup>18</sup> P. C. Schmitter, T. L. Karl. What democracy is... and is not. – 2(3), *Journal of democracy*, 1991, pp. 85-87.

<sup>19</sup> O. J. Reuter, D. Szakonyi. Online Social Media and Political Awareness in Authoritarian Regimes. –45(1), *British Journal of Political Science*, 2014, pp. 29-51, and A. T. Little. Communication technology and protest. –78(1) *The Journal of Politics*, 2016, pp. 152-166.

<sup>20</sup> Regan, Henderson, *op. cit.*, pp. 120-121; 131-132.

<sup>21</sup> A. C. Poveda. Economic Development, Inequality and Poverty: An Analysis of Urban Violence in Colombia. – 39(4) *Oxford Development Studies*, 2011, p. 465.

Semi-democracies, contrarily, are more prone to the risks of violence. Usually these systems are characterized by a relatively strong commitment to honoring personal freedom, yet often there is a lack of actual involvement of different groups. This might be due to the unwillingness or incomprehension of political elites to actually pursue democratic principles or the lack of mechanisms to meaningfully channel social engagement into political decision-making processes.<sup>22</sup> Inadequate credibility of the authorities in power tends to obscure the transparency and legitimacy of political process. This, in turn, increases the likelihood that the opposition secures enough support to topple the ruling government, generating further instability into the system. Moreover, semi-democracies are mostly associated with state incapacity and weak institutions, lacking the resources and capacity to effectively prevent and combat violence.<sup>23</sup> A major root cause that further deteriorates the effectiveness of institutions is corruption which leads to exploiting much of the resources for personal instead of societal benefits.<sup>24</sup>

The most important implication from the theory of inverted U-shaped curve between violence and democracy is that not every step towards a more democratic system necessarily feeds into better outcomes in terms of public security. From the perspective of security, it is paramount to implement strong and meaningful reforms in the democratization process. Empirical evidence suggests that only democratic societies with strong institutions and full adherence to democratic principles, such as the rule of law or protection of individual freedom, show intrinsically improved results in the fields of public security and human rights.

To decrease the level of violence in weak democracies, it is of foremost importance to pursue necessary reforms for strengthening the institutional capacity and eventually the democratic culture, supporting truly inclusive democratic processes. Key prerequisites and avenues for improvement that semi-democratic states should undertake in order to move towards a more orderly public security apparatus have been identified:<sup>25</sup>

(1) In the effort to calm mounting violence, governments themselves always need to honor the underlying norms of democracy and human rights. This embodies outright avoidance of abuses of human rights, such as extrajudicial killings, enforced disappearances, displacement of innocent civilians, arbitrary detention with little due process, cruel punishment or torture. This is imperative being the only way for these norms eventually becoming an inherent part of the society. Yet, local

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<sup>22</sup> Davenport, Armstrong II, *op. cit.*, p. 542.

<sup>23</sup> Fearon, Laitin, *op. cit.*, pp. 75-90, and Davenport, Armstrong II, *op. cit.*, p. 551-552.

<sup>24</sup> A. Graycar. Corruption: Classification and analysis. –34(2), Policy and Society, 2017, pp. 87-96.

<sup>25</sup> Albright, *et al.*, *op. cit.*, pp. 1-28.

circumstances should be taken into consideration while developing policies for fighting violence as far as the actions are not in conflict with fundamental democratic values.

(2) States need to establish credible, inclusive and transparent channels for involving civil society. Holding free and fair elections regularly for legislative seats and other most important executive positions is a necessary but not sufficient requirement for effectively involving civil society. Political participation of all societal groups at all levels and at all times should be encouraged.

(3) Strengthening public institutions is a key element in building up a strong democracy. Strong, accountable and transparent institutions help to keep up fundamental democratic principles, such as the rule of law, or address corruption with suitable anti-corruption tools. Moreover, auditing and oversight structures need to be developed in close association to strengthening institutions. For the institutions to function efficiently and be based on meritocratic principles, they need to be adequately funded.

(4) States should strive for more gender-equal societies. Empirical evidence suggests that a more widespread involvement of women in political processes as well as in mechanisms for peaceful settlement of disputes paves a way to less conflict.

(5) Adequate reforms based on best practices in the security sector must be carried out, including strengthening effective law enforcement and criminal justice systems that uphold due process. The use of force by the military must be subject to democratic control. Military personnel must receive ample training in order to naturally comply with international humanitarian (IHL) and human rights law (IHRL). Military personnel must also be held accountable to democratic and human rights principles. Last but not least, public security agencies must be properly resourced.

Abundant crime is mainly characteristic to semi-democratic systems. One of the avenues for improving the state of public security would be the strengthening of democratic institutions. A possible setback, however, is that extensive violence may be detrimental to the development of strong institutions.<sup>26</sup> To avoid this so-called violence trap, it is of utmost importance that semi-democratic states tackle the criminal activities. If democratic norms, practices and institutions are not safeguarded in the fight against crime, the initial positive results may be short-lived as suggested by the inverted U-shaped curve. As regards human rights, the findings from literature evidently demonstrate that only states with a strong democratic system truly endorse human rights principles.

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<sup>26</sup> G. W. Cox, D. C. North, B. Weingast. *The Violence Trap: A Political-Economic Approach to the Problems of Development*. Working Paper, California: Hoover Institution, Stanford University, 2015.

Mexico is known for high prevalence of crime, including domestic violence, organized crime and trafficking. High income inequality and poverty rates, a widespread feeling of impunity and the use of lethal violence by police are all contributing factors to high rates of crime. The current wave of violence is mostly attributed to the struggles of democratic consolidation and economic development as well as to the inability of improving social inclusion.<sup>27</sup> More specifically, it has been suggested that much of the violence in Mexico can be linked to (1) social inequality, (2) level of poverty, (3) drug production and trafficking, and (4) general perception of impunity which is linked to the distrust of the judicial system and law enforcement.<sup>28</sup> As a result, the majority of violence is delinquent and not political.<sup>29</sup> Long-lasting violence suggests that Mexico has systematically failed to mitigate related concerns.

While the interlinkages between democracy and public security are complex, the approach taken in this thesis, based on the empirical findings and the discussion above, follows the proposition that a well-established democracy delivers a more stable and secure society over the longer term. Furthermore, the underlying structure of democracy is the origin for solid protection of human rights.

## **1.2. The Functioning and Robustness of Democracy in Mexico**

To further understand the role of democracy for public security in Mexico, this sub-chapter examines how robust its democratic system is. This will set up a basis for analyzing the implications of the proposed Mexican internal security law, National Guard and militarization in general on the security situation and the protection of human rights. The meaning of democracy is more ambiguous than it might seem at the first glance. To grasp what is the role of democracy in terms of peace and security, it is paramount to specify what is meant by the term. Even so, the purpose of this paper is not to define or thoroughly characterize democracy. The primary interest is on the specificities and functioning of democracy in Mexico. Hence, a brief overview of the term is given. It further serves to explain why the approach of democratic accountability is of interest in this thesis. Following the explanation of the approach, the focus will be turned to the relevant characteristics of democracy in Mexico.

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<sup>27</sup> K. Koonings, D. Kruijt. *Societies of fear: The legacy of civil war, violence and terror in Latin America*. Zed Books, 1999, p. 3.

<sup>28</sup> J. Pearce. Perverse state formation and securitized democracy in Latin America. *Journal Democratization*. –17(2), 2010, pp. 293-294.

<sup>29</sup> C. O. N. Moser, C. McIlwaine. *Latin American Urban Violence as a Development Concern: Towards a Framework for Violence Reduction*. –34(1), World development, Great Britain, 2006, p. 96.

Some references to Latin America are made throughout the analysis of the functioning of democracy in Mexico. Authors commonly take the view that the development of democracy in Mexico shares similar traits with transition processes in other Latin American countries.<sup>30</sup> Similarities in political and economic development derive from, *inter alia*, common colonial past, language and religion. It is for this reason that a comparison of some of the processes is deemed valuable.

Liberal democracy has become the dominant political idea in modern world but it is worth highlighting that the term has evolved considerably over time. Scholars have been re-defining the term by adding or adapting the conditions and requirements that are needed for a full-fledged democracy. Various approaches to democracy have been defined as a result.<sup>31</sup> Early attempts to define democracy can be concluded so that democracy is an arrangement where people gain a collective capacity for making decisions to achieve the common good.<sup>32</sup> This definition can be seen as problematic as the centerpiece here is the common good which in itself is quite a vague term. The interests of individuals in a society usually diverge to a great extent and cannot be aggregated into a single variable. This is the reason Schumpeter<sup>33</sup> has argued that for a democracy to work properly, political forces representing different parts of the society need to be competing with each other at elections. This definition helps to overcome the vagueness of the term public interest, suggesting that while ideas compete, the decisions are based on the will of the majority.

Not all authors, however, have agreed with such minimalist way of defining democracy, indicating that free and fair elections in themselves do not guarantee a well-functioning democratic regime. On that account strong and functional institutions are also emphasized as essential pillars for a democratic society. These include rule of law, separation of powers or civil and political rights. Beetham<sup>34</sup> points out that what makes democracy distinctive is favoring the legitimate rule and decision-making of the majority over collective decision-making while strong institutions are the key. This means that representative democracy has become the basis of democratic idea. While direct democracy may have desirable attributes, its actual functioning has proved to be inefficient

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<sup>30</sup> P.H. Smith. *Democracy in Latin America: Political Change in Comparative Perspective*, Third Edition. Oxford and New York: Oxford University Press, 2005.

<sup>31</sup> See, for example, D. Collier, S. Levitsky. *Democracy with Adjectives: Conceptual Innovation in Comparative Research*. –49(3) *World politics*, Cambridge University Press, 1997, pp. 430-451.

<sup>32</sup> J. Ober. The Original Meaning of “Democracy”: Capacity to Do Things, not Majority Rule. –15(1), *Constellations an International Journal of Critical and Democracy Theory*, 2008, p. 7.

<sup>33</sup> J. A. Schumpeter. *Capitalism, Socialism and Democracy*. New York: Harper Perennial, 1976, p. 269.

<sup>34</sup> D. Beetham. *Democracy and Human Rights*. Cambridge: Polity Press, 1999, p. 90.

which is why it is not the underlying meaning of democracy. Dahl's<sup>35</sup> seminal work points out criteria or individual rights that must be fulfilled in order to have a functioning representative democracy, emphasizing the role of people and competitive interest groups in holding the representatives accountable.

More recently, there has been a growing emphasis on effective democracy, which means that democratic institutions need to be functioning efficiently also in practice. This means that the principles established by laws in terms of free and fair elections or other democratic principles have to function accordingly in reality. How effective a democracy can be described by assessing to what extent the results of elections, or political input, actually determine the decisions that are made, i.e. political output. If political input translates into political output fairly well, democracy can be classified as effective which is the opposite of formal democracy.<sup>36</sup> This indicates that it is crucial to analyze how the established democratic principles work to discern whether a seemingly democratic rule translates into democratic principles in practice.

A simplified way to approach the question of how effective a democratic rule is would be to assess the functioning of the system against a set of principles. For instance, four main necessary conditions have been used to analyze the effectiveness of democracy in Latin America: (1) Regular occurrence of free and fair elections; (2) Nearly universal adult suffrage; (3) Protection of constitutional rights; (4) Negligible influence of the military and criminal organizations on the government. After performing an analysis by applying those conditions on Mexico, the authors come to the conclusion that it is a stable democracy with shortcomings.<sup>37</sup> A similar conclusion can be drawn from various democracy indexes.<sup>38</sup> While this is a valuable indication, it does not reveal whether those deficiencies fundamentally hinder the functioning of democracy. For the purpose of this thesis, it is essential to analyze to what extent certain democratic shortcomings may affect the performance and risks of the use of military forces for law enforcement.

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<sup>35</sup> R. A. Dahl. *Democracy and Its Critics*. Yale University Press, New Haven Connecticut, 1989.

<sup>36</sup> R. Inglehart, C. Welzel. *Political Culture and Democracy: Analyzing Cross-Level Linkages*. Comparative Politics, New York, 2003, p. 66.

<sup>37</sup> S. Mainwaring, A. Pérez-Liñán. Cross-Currents in Latin America. –26(1), *Journal of Democracy*, 2015, p. 115.

<sup>38</sup> Most prominently *Freedom in the World 2019* by Freedom House; *Democracy Index 2018* by The Economist Intelligence Unit; and *Governance Index in the Bertelsmann Transformation Index (BTI)*.



Democracy can only function effectively in the presence of good governance. Yet, one of the most distinct characteristics of good governance is strong accountability.<sup>39</sup> The more the public officials perceive the obligation to justify their conduct to the relevant institutions or the general public, the stronger the accountability mechanisms are.<sup>40</sup> Leaders and officials on different levels of democratic governance must be held accountable for how they discharge their responsibilities to ensure good governance, and thus, accountability is *sine qua non* for democratic rule.<sup>41</sup> If this is not the case, government's processes remain opaque, which may lead to disregard of public goals and significantly impair and fracture a seemingly democratic rule. The reason for this is the nature of representative democracy where the power is gained in elections, making the representatives susceptible to corruption and misuse of power.<sup>42</sup> The goal of holding representatives accountable is to force them to correct their behavior and justify their acts and omissions. Accountability mechanisms ensure that misbehavior and power abuse result in equivalent sanctions, formal or implicit, against the public officials.<sup>43</sup>

While much of the research makes assumptions about institutional setups in which democracies either flourish or break down, the actual situation is more nuanced and regional differences must be accounted for being able to understand the state of democracy.<sup>44</sup> For evaluating the effectiveness of democracy in Mexico, the focus here will be on how various accountability mechanisms support the functioning of democratic system. Accountability framework is pivotal for understanding democratic processes in any Latin American country because it sheds light on why and how the key principles endorsed by the states, such as the human rights framework, are respected in practice. A strong framework enhances the capacity of the state to implement the rule of law. Furthermore, in the context of this thesis, the accountability perspective also establishes a framework for analyzing whether the legalization of militarization of police forces could possibly be a successful way forward if meticulously designed safeguards are included in the law. When the state of democratic accountability is weak, these safeguards have little value in preventing human rights abuses and other unintended consequences resulting from militarization. Conversely, when

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<sup>39</sup> S. Kosack, A. Fung. Does Transparency Improve Governance?. –17(1), Annual Review of Political Science, 2014, pp. 65-87.

<sup>40</sup> J. S. Lerner, P. E. Tetlock. Accounting for the Effects of Accountability. –125(2), Psychological bulletin, 1999, p. 255.

<sup>41</sup> M. Bovens. Public Accountability. The Oxford Handbook of Public Management, Oxford, 2005, p. 192.

<sup>42</sup> C. T. Borowiak. Accountability and Democracy: The Pitfalls and Promise of Popular Control. Oxford University Press, Oxford, 2011, p. 16-17.

<sup>43</sup> M. Philp. Delimiting Democratic Accountability. –57(1) Political Studies, 2009, pp. 28-53.

<sup>44</sup> D. J. Yashar. Democracy, Indigenous Movements, and Postliberal Challenge in Latin America. –52(1) World Politics, 1999, pp. 97-104.

accountability framework is strong, these safeguards can be effective and temporary use of military forces for fighting serious criminal activity could be conceivable.

Multiple conceptual approaches to accountability exist. For instance, authors have distinguished between principal-agent framework, internal and external or direct and indirect accountability.<sup>45</sup> For the purpose of this thesis, however, the dimensions of horizontal and vertical accountability accommodate the research problem the best. This approach also helps to identify the realms of democratic governance which must be reinforced to conceive the military resources undertaking some of the traditional police tasks in Mexico. An overview of horizontal and vertical accountability and the tools in the possession of different institutions is given in annex 1.

Horizontal accountability refers to institutional and procedural limitations on power of the public officials and institutions. These concern the separation of powers, the system of checks and balances, or the due process.<sup>46</sup> When those principles are firmly part of the democratic rule, they effectively limit the threat of power abuse.<sup>47</sup> Vertical accountability, on the other hand, pertains to the instruments that the general public can deploy to raise social demands, control the government and hold the public officials accountable. The predominant element in here is the centerpiece of democratic rule – elections. The main downside of elections is that they only take place periodically.<sup>48</sup> To compensate this, effective functioning of other elements of vertical accountability, such as civil society and media, is crucial.<sup>49</sup>

It is evident that the effectiveness of accountability mechanisms is determined by both formal and informal procedures that have country-specific historical, institutional and cultural features. Strengthening both the horizontal and vertical accountability enables the emergence of more solid democratic systems. Because of the persistent nature of accountability arrangements, especially cultural values and institutional framework, improvements rarely take place swiftly.<sup>50</sup> Measures that aim to improve accountability will have a gradual effect towards a more democratic system.

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<sup>45</sup> R. Almquist, *et al.* Public Sector Governance and Accountability. –24(7-8) Critical Perspectives on Accounting, 2013, p. 480.

<sup>46</sup> G. A. O'Donnell. Horizontal Accountability in New Democracies. –9(3), Journal of Democracy, 1998, p. 119.

<sup>47</sup> S. P. Ruth. Populism and the Erosion of Horizontal Accountability in Latin America. –66(2), Political Studies, 2018, p. 357.

<sup>48</sup> O'Donnell, *op. cit.*, pp. 112-113.

<sup>49</sup> A. Elbasani, S. Š. Šabić. Rule of law, corruption and democratic accountability in the course of EU enlargement. – 25(9), Journal of European Public Policy, 2018, p.p. 1320-1321.

<sup>50</sup> A. N. Licht, C. Goldschmidt, S. H. Schwartz. Culture rules: The foundations of the rule of law and other norms of governance. –35(4), Journal of Comparative Economics, 2007, pp. 673, 682.

Democratic regimes in Latin American countries have been discussed in the literature in numerous occasions. These studies provide a significant insight on Mexico. Profound differences and weaknesses can be pinpointed in the democratic system of Mexico compared to more advanced democracies. Several flaws related to traditional sources of accountability, such as formal elections or the system of check and balances, point to considerable institutional deficit. Many authors have concluded that if these inadequacies are sizeable, democratic rule is illiberal.<sup>51</sup> It has also been argued that systems with serious horizontal and vertical accountability bottlenecks can fall into so-called low accountability traps in which flaws in different accountability arrangement reinforce each other.<sup>52</sup> Hence, improvements in horizontal accountability mechanisms might help to reinvigorate transition towards more dynamic vertical accountability practices.

Multiple vocal civil society organizations have emerged in Mexico<sup>53</sup>, significantly strengthening the accountability of office holders. These movements have clearly had some success in the micro-level but in general have not yet been able to decisively curb deep-rooted corruption and impunity.<sup>54</sup> These limitations notwithstanding, it has become increasingly critical to consider alternative sources of accountability in evaluating the robustness of the democratic system in Mexico.

As regards horizontal accountability, the doctrine of separation of powers is the underlying principle of constitutional democracies that is designed to avoid excessive consolidation of power. As a result, it enhances the accountability of public officials.<sup>55</sup> Typically, it limits the exercise of the core functions between executive, legislative and judicial branches, though contemporary democratic rules have additional layers of oversight bodies and other agencies to further underpin the limitation of power. The principle of separation of powers substantially limits the likelihood that one branch of the government assumes some of the fundamental functions of another branch, creating the primary source of accountability. As such, different bodies depend on each other in implementing policies.<sup>56</sup> This implies, for instance, that even though legislative branch is responsible for creating laws, executive branch commonly has the task to draft the laws and judicial

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<sup>51</sup> P. H. Smith, M. R. Ziegler. *Liberal and Illiberal Democracy in Latin America*. –50(1) *Latin American Politics and Society*, 2008, pp. 36, 46.

<sup>52</sup> J. A. Fox. *Accountability Politics: Power and Voice in Rural Mexico*. Oxford University Press, Oxford, 2007, pp. 337-339.

<sup>53</sup> Such as Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C.

<sup>54</sup> M. Kaiser, V. Ríos. *Mexico's Anti-Corruption Spring*. – V, Ríos., D, Wood (eds). *The Missing Reform: Strengthening Rule of Law in Mexico*. Washington D.C.: Woodrow Wilson Center Press 2018, pp. 32-35.

<sup>55</sup> T. Persson, G. Roland, G. Tabellini. *Separation of Powers and Political Accountability*. –112(4). *The Quarterly Journal of Economics*, 1997, p. 1166.

<sup>56</sup> *Ibid.*, pp. 1166-1167.

branch interprets them. The principle of separation of powers was significantly reinforced in Mexico at the turn of the twenty-first century when constitutional structure was fundamentally ameliorated and the single-party democracy brought to an end.<sup>57</sup> Subsequent to these changes the already existing constitutional principle of separation of powers took effect in practice.

Horizontal accountability is not effective, however, in case of purely isolated powers and agencies but it is important to have counterbalancing interlinkages.<sup>58</sup> Each branch of the government must have explicit instruments designed for checking and balancing other branches. These instruments can be developed under two conditions: (1) existing conflict of interest between at least two branches of government; (2) necessity to reach an agreement between two or more institutions with distinct powers.<sup>59</sup> Hence, effective separation of powers is a prerequisite for a compelling system of checks and balances – a complex array of procedures which regulate the rights and obligations between the branches of government. The general purpose of those procedures is to overcome the risk that any of the branches would exceed its role or mandate. The checks and balances are sufficient only if each branch of the government has adequate powers to scrutinize the performance of other branches and take actions if needed.<sup>60</sup> Above all, judicial review validates whether the actions by other branches are constitutional. If not, these actions are declared null and void.

The reforms undertaken in Mexico over the past two decades have sought to improve the system of checks and balances, yet, the period of transformation is on-going, generating uncertainty and fragility.<sup>61</sup> One of the foremost drawbacks has been the politicization of the judiciary, resulting in subservient and biased institutions.<sup>62</sup> This is to some extent a result of frequent constitutional reforms aiming at bolstering the rule of law which at the same time have offered a pretext for reshuffling the courts.<sup>63</sup> Constant overhaul of the judiciary may prevent the development of a strong and independent judicial system. Moreover, recent studies have found that populist governments with a strong electoral mandate can be detrimental to checks and balances by changing institutional order and, thus, weakening horizontal accountability.<sup>64</sup> This may have a notable negative effect on

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<sup>57</sup> S. Zamora, J. R. Cossío. Mexican constitutionalism after presidencialismo. –4(2), International Journal of Constitutional Law, 2006, pp. 413-414.

<sup>58</sup> O'Donnell, *op. cit.*, p. 119.

<sup>59</sup> Persson, Roland, Tabellini, *op. cit.*, p. 1166.

<sup>60</sup> J. Ríos-Figueroa. Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002. – 49(1), Latin American Politics and Society, 2007, pp. 48-49

<sup>61</sup> Zamora, Cossío, *op. cit.*, p. 436.

<sup>62</sup> Smith, Ziegler, *op. cit.*, p. 31.

<sup>63</sup> A. Pérez-Liñán, A. Castagnola. Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America. –46(2), British Journal of Political Science, Cambridge University Press, 2016, pp. 412-413.

<sup>64</sup> Ruth, *op. cit.*, p. 370.

accountability in Mexico where the recent shift of power to President López Obrador has raised further questions on the soundness of the system of checks and balances.<sup>65</sup>

Another indispensable layer of horizontal accountability is due process. This principle implies that all democratic institutions follow the laws and fundamental principles of the state. It guarantees equality before the law and that decision-making processes follow fair procedures. Mexico has experienced serious breaches in the due process in recent years, in particular in the field of criminal justice. The government has endorsed a strategy of fighting against organized crime no matter what actions are involved, including systematic use of repressive mechanisms like preventive detention and imprisonment.<sup>66</sup> Such exceptional measures constitute a legal departure from human rights standards, and this greatly endangers the accountability framework, undermining the rule of law.

The framework of horizontal accountability has certain shortfalls and uncertainties in Mexico as described above. The key constitutional principles are in place, but it does not necessarily hold relevant public authorities and officials accountable.<sup>67</sup> The democratic system has improved since 2000 when the Institutional Revolutionary Party (PRI) lost its undivided authority over the country. This coupled with constitutional reforms has fundamentally strengthened the democratic processes. Nonetheless, it will take time for those processes to become fully embedded within the system. Until then, Mexican democracy remains somewhat weak and vertical accountability mechanisms are crucial to support its functioning.

One of the sources of vertical accountability is a well-functioning electoral system. It has been argued that while free and fair elections are a necessary element of a democratic system, they are in fact a weak source of accountability.<sup>68</sup> Through elections citizens award the power to the winning political force. While this decision is made based on political promises, it does not oblige the office holders to govern according to this vague mandate. If the electorate is discontented with the way of governing, the only formal chance to sanction the government is in the next elections. Another dimension weakening the role of elections even more is information asymmetry.<sup>69</sup> The less

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<sup>65</sup> AMLO will be the most powerful Mexican President in decades. *The Economist*, 01.12.2018.

<sup>66</sup> P. I. de la Rosa Rodríguez. Criminal Justice, Due Process and the Rule of Law in Mexico. –11(2), *Mexican Law Review*, Instituto de Investigaciones Jurídicas UNAM, 2019, pp. 149, 170.

<sup>67</sup> Bertelsmann Stiftung's Transformation Index (BTI), 2018 Country Report. Mexico, pp. 11-13.

<sup>68</sup> A. Przeworski, S. C. Stokes, B. Manin (eds.). *Democracy, Accountability, and Representation*. Cambridge: Cambridge University Press, 1999, p. 44.

<sup>69</sup> *Ibid.*, p. 44.

transparent a government's rule is, the less information the voters have for evaluating its appropriateness, both its accomplishments and failures.

Mexico has a multiparty system where electorate can make a choice between views from different parts of the political spectrum.<sup>70</sup> This notwithstanding, often the winning candidate retreats starkly from campaign promises and mandate gained in elections.<sup>71</sup> This raises questions over the legitimacy of the government's rule and the adequacy of vertical accountability mechanisms between the elections. To mitigate obvious discrepancies, the informal link between the campaign promises and political decisions by the office holders needs to be reinforced.

Accountability studies have not always included civil society as a major source of accountability. This has changed with the upsurge of civil society in advanced democracies. Non-governmental organizations tend to be less effective in otherwise poorly functioning democratic systems.<sup>72</sup> However, it has been noted that civil society can be instrumental in stabilizing, deepening and consolidating flawed democratic systems.<sup>73</sup> The role of non-governmental organizations in controlling the government's use of power is to monitor its acts and omissions. By increasing the transparency of government's actions, civil society has an important function in agenda-setting.

Civil society can effectively deter the power abuse through two main channels: (1) By exposing and criticizing government's acts, it raises the public awareness and helps to put relevant issues on the public agenda. Shedding light upon previously opaque matters makes it difficult for public officials to negate the issues, increasing their responsibility for taking actions. (2) Elevated awareness can activate some of the instruments of horizontal accountability because it increases the possible reputational or judicial cost for public officials.<sup>74</sup> Media supports civil society by sharing its findings and generating relevant information on its own. It plays a crucial role due to its ability to bring issues into the limelight.<sup>75</sup> As a consequence, an effective civil society creates risks for public officials that the instances of misconduct will become public. This may deter officials from taking actions that are not in public interest.

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<sup>70</sup> Mainwaring, Pérez-Liñán, *op. cit.*, p. 120.

<sup>71</sup> G. B. Johnson, S. R. Ryu. Repudiating or Rewarding Neoliberalism? How Broken Campaign Promises Condition Economic Voting in Latin America. –52(4), *Latin American Politics and Society*, 2010, p. 18.

<sup>72</sup> C. Balderacchi. Problems and contradictions of participatory democracy: lessons from Latin America. – 22(2), *Journal Contemporary Politics*, 2016, p. 174.

<sup>73</sup> M. L. Cruz-Coke. Between stability and crisis in Latin America. –12(1), *Journal of Democracy*, 2001, p. 144.

<sup>74</sup> Smulovitz, Peruzzotti, *op. cit.*, p. 152.

<sup>75</sup> M. S. Segura, S. Waisbord. Media movements: Civil Society and Media Policy Reform in Latin America. Zed Books Ltd. The University of Chicago Press Books, 2016.

The clout of civil society organizations is a key determinant that helps to understand the extent of accountability deficit. Civil society organizations are the most effective when they are autonomous from the state and their demand making process is institutionalized. Autonomous organizations are sufficiently independent from the state in both their actions and finances, so that they will not be biased and can openly challenge the government.<sup>76</sup> Institutionalized demand making helps to ensure that the way of operation of civil society is rule-based and transparent.<sup>77</sup> The classification of the relations between civil society and the state helps to assess the strength of civil society in holding the office holders accountable.<sup>78</sup> Civil society in Mexico can be classified as bifurcated because the organizations are independent enough to challenge the state in the most crucial matters.<sup>79</sup> At the same time, there is space for further institutionalization of civil society.

As the analysis above suggests, Mexico suffers from both horizontal and vertical accountability deficit which weakens its democratic potential. Lack of trust towards democratic institutions is aggravated by impaired democratic participation of general population which undermines the functioning of the system.<sup>80</sup> As such, Mexico can be classified as a semi-democracy. At the same time, sizeable improvements in both horizontal and vertical accountability need to be emphasized. Constitutional reforms and empowered civil society have been a crucial factor in it. While the progress has been substantial, several of the weaknesses remain proving how culturally dependent accountability and democratic mechanisms are. Democracy in Mexico has been going through a significant transformation which is still in progress. Hence, positive results expected from an efficient democratic system may not materialize immediately. On the contrary, several setbacks are to be anticipated. This makes it ever more important for Mexican authorities to proceed with the reforms as suggested above.<sup>81</sup>

Mexico is facing an unprecedented wave of violence which needs to be tackled. When violence is rooted in the social order, death tolls are rising and insecurity soaring, it is understandable that some sort of urgent solution is expected from the authorities. The most obvious solutions, such as strengthening the police force and implementing poverty-reduction programs, however, are

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<sup>76</sup> G. Baiocchi, P. Heller, M. K. Silva, M. Silva. *Bootstrapping Democracy: Transforming Local Governance and Civil Society in Brazil*. Stanford California: Stanford University Press, 2011, p. 34.

<sup>77</sup> *Ibid.*, p. 37.

<sup>78</sup> See annex 2.

<sup>79</sup> For instance, the civil society organization #SeguridadSinGuerra was very vocal in demanding the annulment of the internal security law and eventually achieved this goal as the Supreme Court overturned the law arguing that it was unconstitutional.

<sup>80</sup> Cruz-Coke, *op. cit.*, p. 144, and L. Tedesco. *Democracy in Latin América: Issues of Governance in the Southern Cone*. –23(1), Bulletin of Latin American Research, Journal of the Society for Latin American Studies, 2004, p. 36.

<sup>81</sup> See *supra* chapter 1.1 pp. 12-13.

complicated to implement and only have meaningful results over a longer term. Against this background, demand for firm security responses has increased. If, on the other hand, human rights abuses become embedded in security forces, it rather reproduces and transmits violent acts into the wider society.<sup>82</sup> These interlinkages are one of the reasons why violence is still so prevalent in Mexico. To change the course, the Mexican government has to shape policies that genuinely have the ultimate goals of preventing and reducing violence.

### **1.3 The Role of the Armed Forces in Public Security**

The scope of the use of the armed forces for maintaining public security depends on the specificities of each particular situation. The approaches to contemporary armed violence are complex and oftentimes the classification of the situation is not easy. The boundaries between war, internal disturbances and tensions or sporadic acts of violence are considerably ambiguous. On that account, the international community has been cautious when classifying a situation as an international or non-international armed conflict (NIAC).<sup>83</sup> The main reason for such caution is different paradigms that apply based on the classification. In case of an armed conflict, the conduct of hostilities paradigm applies which is governed by IHL; on the other hand, the use of force by law enforcement officials is regulated by the law enforcement paradigm governed by IHRL.<sup>84</sup>

Generally, the armed forces are trained according to IHL rules. The rules and principles regarding the use of force by the armed forces are drafted in the 1907 Hague Regulations<sup>85</sup>, the Additional Protocols to the Geneva Conventions<sup>86</sup> and derive from customary IHL. When it comes to regulating the use of force, the conduct of hostilities paradigm has more permissive standards than the law enforcement paradigm. For example, under IHL the combatants are allowed to use lethal force when killing legitimate targets as long as they observe the basic rules (the principles of proportionality, distinction, necessity and precaution).<sup>87</sup> This follows the logic that the ultimate object of the armed forces while conducting military operations is to defeat the enemy forces with

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<sup>82</sup> Pearce, *op. cit.*, pp. 296, 301.

<sup>83</sup> N. Lamp. Conceptions of war and paradigms of compliance: The 'new war' challenge to international humanitarian law. –16(2), *Journal of Conflict & Security Law*, 2011, pp. 237-239.

<sup>84</sup> G. Gaggioli. *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*. International Committee of the Red Cross (ICRC). 2013.

<sup>85</sup> Convention on the Laws and Customs of War on Land. The Hague IV, e.i.f.18.10.1907.

<sup>86</sup> Protocols Additional to the Geneva Conventions of 12.08.1949. Protocol I and Protocol II. International Committee of the Red Cross (ICRC).

<sup>87</sup> G. Gaggioli. *The Use of Force in Armed Conflicts, Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*. International Committee of the Red Cross (ICRC). 2013, p. iv.



the use of lethal force. Consequently, incidental loss of life, or collateral damage, is tolerated more because it is inevitable in many cases.<sup>88</sup>

On the other hand, police officers and security forces are trained in using force according to the law enforcement paradigm.<sup>89</sup> The use of force in the law enforcement paradigm is primarily based on the right to life that derives from customary international law and human rights treaties as well as national law.<sup>90</sup> Under IHRL, police forces are allowed to use force when performing law and order tasks to maintain or restore public security.<sup>91</sup> Law enforcement officials, however, are forbidden to use lethal force as first instance. Lethal force may only be used for the protection of life if other measures at the disposal of officials are unlikely to yield an intended result. Accordingly, if police force recourse to the use of lethal force, an obligation to investigate every accusation of violation of the right to life emerges under the law enforcement paradigm to determine if the use of force was arbitrary or not.<sup>92</sup> This obligation to investigate does not apply under IHL.

Classifying the drug-related armed violence in Mexico has been a complicated legal question, and it is still disputed. The criteria defined in international law is open to different interpretations and, hence, it is often disputed whether a conflict should be governed by law enforcement paradigm or conduct of hostilities paradigm. In some circumstances military operations are being held in places where the enemies can mingle together with civilians. Being able to distinguish between civilians and the enemy may prove difficult to determine. Consequently, the applicable paradigm can become unclear.<sup>93</sup> However, applying the proper paradigm is crucial because it constitutes the legal basis on how lethal force can be used.<sup>94</sup>

If the armed violence in Mexico is classified as a NIAC, the role of armed forces in public security matters would become clearer. In a contemporary NIAC, combatants are entrusted with not only conducting military operations against the enemy but also with performing law enforcement operations to maintain public security and order.<sup>95</sup> By applying the conduct of hostilities paradigm,

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<sup>88</sup> *Ibid.*, p. 7.

<sup>89</sup> *Ibid.*, p. 44.

<sup>90</sup> *Ibid.*, p. 4.

<sup>91</sup> *Ibid.*, p. iii.

<sup>92</sup> *Ibid.*, p. iv.

<sup>93</sup> *Ibid.*, p. iii.

<sup>94</sup> *Ibid.*, p. 2.

<sup>95</sup> *Ibid.*, p. 1.

the tasks of the armed forces would be under a legal framework governed by IHL in which the use of force would be more in accordance with the training of the combatants. However, police forces would have to remain under the rules of law enforcement paradigm.

It can be argued that the state has practically accepted the conduct of hostilities paradigm by using the armed forces in a way it has been done since 2006. Moreover, the language used by the authorities, most importantly referring to incidental loss of life as collateral damage, rather indicates that, de facto, the authorities approach to the conflict as a NIAC. If de jure approach is different, as the state has declared it is, the use of armed forces for performing public security tasks is questionable.

On the other hand, if the armed violence in Mexico would be classified under the law enforcement paradigm, the rules on the use of force that have been used so far would need to change. The armed forces that are performing public security tasks would have to adjust to the different conditions regulated under IHRL. The rules on the use of force by the armed forces would have to be the same as the ones of the police officers. The use of force by the armed forces would only be allowed in order to maintain public security and law and order. The use of lethal force would only be permitted as a measure of last resort in order to protect life.

The conflict in Mexico has so far not been interpreted as a NIAC by the government. Nonetheless, the authorities have realized that the law enforcement paradigm is not sufficient to fight powerful criminal organizations because of its restrictions on the use of force. While it would be inappropriate to apply IHL in all instances of drug-related violence, the intensity of the conflict in Mexico falls outside the ambit of typical organized crime. The lack of clarity over which paradigm applies in the conflict in Mexico has led to an overlap between the roles of civilian law enforcement and armed forces. This, as a consequence, has obscured the principle of separation of powers that is required for a well-functioning democratic country.

## CHAPTER II. LEGAL CONSIDERATIONS FOR THE USE OF THE ARMED FORCES

### 2.1. Legal Framework for the Safeguarding of Public Security

#### 2.1.1. The Effectiveness of the Criminal Justice System

The underlying cause of the mounting violence in Mexico is not only drug-trafficking but much of the problems are generated by flaws in democratic governance, as discussed in chapter I. Dysfunctional judicial system is a key element in institutional setup of Mexico's democracy that is dragging down the development of the country. Law enforcement and judicial structures are unable to effectively prevent, investigate, or punish crime and violence.<sup>96</sup> Even if the drug cartels were destroyed with the help of the armed forces, this would not necessarily solve the problems with crime as other forms of criminal groups could emerge. To reduce violence over longer term, more structural issues need to be solved, including addressing shortcomings in judicial system.<sup>97</sup> If this was done properly, it would, *inter alia*, make creating a temporary framework for the use of armed forces in law enforcement more feasible. Namely, it would facilitate bringing the members of the armed forces to justice.

The fundamental structure of Mexico's legal system is based on the principle of supremacy of the national Constitution. It is also based on the principle of separation of powers, restricting one another's power through effective controls so the power would not concentrate within one entity or individual. In 2008, a Constitutional reform was approved in Mexico to initiate a process of transition from a mixed inquisitorial criminal justice system to an adversarial accusatory system. The reform established an eight-year term expiring in 2016 to fully switch to the new system.<sup>98</sup>

In the mixed inquisitorial justice system, there was no division of functions and no balance of power as investigation, prosecution and judgment were generally concentrated within the same organ. Thus, one of the main differences in the new accusatory system included the reconsideration of the limits and control of the judicial power that previously existed in the mixed inquisitorial

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<sup>96</sup> K. Dabaghi, J. M. Alatorre. The neglected Root of Mexico's Drug War. World Politics Review. 12.10.2010.

<sup>97</sup> *Ibid.*

<sup>98</sup> A total of 10 Articles of the Constitution were reformed: Articles:16-22, 73,115 and 123.

justice system.<sup>99</sup> This transformation of the criminal justice system has been one of the most important acts of progression in the legal framework in Mexico, offering measures for seeking justice in a more efficient and satisfactory way.<sup>100</sup>

The reform of the criminal justice system intended to achieve a justice system that is proper for a state honoring the rule of law. The accusatorial system sets a clear division of functions between those who investigate, indict, defend and judge. It focuses on guaranteeing and protecting to a greater extent the fundamental rights and safeguarding the integrity of both, the victims and the defendants, throughout the proceedings. It also places a strong emphasis on the interests of the society as a whole.<sup>101</sup> The new system vowed more transparency, accountability and procedural equality between the parties.<sup>102</sup> For example, the presumption of innocence of the accused was not taken into consideration in the previous justice system, whereas the new system considers this legal principle as a vital one.<sup>103</sup> In connection with this principle, Article 19 of the Constitution contemplates that pre-trial imprisonment must be the last alternative as a precautionary measure and, therefore, exceptional and well justified.<sup>104</sup>

The new accusatory system introduced several guiding principles that regulate all the stages of the proceeding. Among the principles are: orality, immediacy, publicity, equality between the parties, impartiality, concentration, continuity and contradiction. These principles are enshrined in Article 20 of the Constitution and in the legal doctrine.<sup>105</sup>

In fact, orality or the use of oral procedures is not considered as a principle *per se* but as an element that facilitates and advances the development of the investigation. For example, the orality of the proceeding is closely related to the principle of immediacy. The main function of this principle concerns the regulation of the hearing of evidence in an oral and uninterrupted manner in the presence of all the parties concerned.<sup>106</sup> The principle of publicity or open court principle requires

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<sup>99</sup> El Nuevo Sistema de Justicia Penal Acusatorio, Desde la Perspectiva Constitucional. Mexico: Consejo de la Judicatura Federal 2011, p. 99.

<sup>100</sup> González Obregón, *op. cit.*, p. 2.

<sup>101</sup> El Nuevo Sistema de Justicia Penal Acusatorio, Desde la Perspectiva Constitucional. Consejo de la Judicatura Federal, p. 34.

<sup>102</sup> A. Cuéllar Vázquez, A. López Ugalde, A. Loera Martínez. Derechos Humanos y Ejecución Penal en el Nuevo Sistema de Justicia de México. –72(1), Acta Sociológica, 2017, p. 211.

<sup>103</sup> *Ibid.*, p. 208.

<sup>104</sup> El Nuevo Sistema de Justicia Penal Acusatorio, Desde la Perspectiva Constitucional. Consejo de la Judicatura Federal, p. 45.

<sup>105</sup> See Article 20 of the Mexican Constitution and González Obregón, *op. cit.*, p. 30.

<sup>106</sup> Sistema Acusatorio Adversarial, Juicios Orales, Principios Rectores del Juicio Penal Acusatorio Adversarial, Poder Judicial del Estado de Colima, p. 3.

the proceedings to be open and accessible to the public and the media. The aim is to further transparency and to better involve the society in the functioning of the criminal justice system.<sup>107</sup>

Moreover, the principle of equality between the parties or equality of arms aims to guarantee the rights contemplated in the Constitution and treaties. These rights include that all the parties of the proceeding, including the victim, the accused, the prosecutor and the public defender, have the same opportunities to present evidence and at the same time all parties are able to dispute it and challenge it during the oral proceeding.<sup>108</sup>

On the other hand, the well-known principle of impartiality establishes that the final judgments should be founded on objective criteria. For example, the new accusatory system contemplates the participation of different judges throughout different phases of the case. For instance, the judge in charge of the oral proceeding shall not have prior information of the case that might prejudice or bias its opinion.<sup>109</sup> The implementation of this principle is crucial to achieve a division of functions and balance of power within the system.

Moreover, the principle of concentration allows the maximum number of acts to be carried out in the least number of hearings. Procedural celerity in the new justice system is essential in order to provide justice in a prompt and expedite manner. Furthermore, the aim of the principle of continuity is to ensure that the hearings develop in a continuous manner without interruptions. Also, it aims to reduce the time-gaps in between the hearings in order to shorten the trial.<sup>110</sup> These two principles are strongly connected since both seek procedural efficiency. Lastly, the principle of contradiction, also called adversarial principle, is one of the most important elements of the new justice system. This principle allows each party to represent their interests and manifest their standpoint but also gives them the opportunity to contradict the claims and evidence of the opponent during the oral trial.<sup>111</sup>

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<sup>107</sup> González Obregón, *op. cit.*, p. 37.

<sup>108</sup> R. Santacruz Lima. El Principio de Igualdad entre las Partes en el Proceso Penal en México. –6(11), Ciencia Jurídica, México, 2017, p. 139.

<sup>109</sup> González Obregón, *op. cit.*, p. 41.

<sup>110</sup> Sistema Acusatorio Adversarial, Juicios Orales, Principios Rectores del Juicio Penal Acusatorio Adversarial, Poder Judicial del Estado de Colima, p. 3.

<sup>111</sup> M. Mrčela. Adversarial Principle, the Equality of Arms and Confrontational Right- European Court of Human Rights Recent Jurisprudence. –1(1), EU Comparative Law Issues and Challenges, 2017, p. 18.

Besides the principles introduced as a result of the constitutional reform, it is also important to mention that the criminal justice system is comprised of five institutions: the police, the prosecutors, the public defenders, the judges and the social reintegration centers. The new justice system provides these institutions with new functions and responsibilities. The thesis will cover the first four of these institutions because social reintegration centers fall outside the ambit of this thesis.

In this vein, the accusatory system intends to strengthen the investigative powers of police by granting them with greater autonomy.<sup>112</sup> The investigative powers of police include the responsibility of preserving the crime scene in order to obtain and protect the evidence and other means of proof. Also, they have the duty to conduct interviews and to retain data provided by the victims and witnesses.<sup>113</sup> In order to have better outcomes in the investigations, police need to coordinate and combine efforts together with the prosecutor and the experts (such as forensic experts).

Moreover, the prosecutor, has the burden of proof, which means that they must investigate the alleged facts that constituted the crime. As mentioned before, the prosecutor has to collaborate with the police and the experts to obtain necessary evidence that will be part of its investigation and analysis which will be concluded in the theory of the case that will be presented to the judge.<sup>114</sup>

The role of the public defender is to develop its theory of the case in a judicious and clever way so that it is possible to refute the opposite's claims.<sup>115</sup> The defense can be represented either by a public defender or by a private attorney.

Lastly, the role of the judges thoroughly changed as they are required to be more involved with the parties and be present in most of the hearings. The accusatory system established the creation of two different figures, the control judge (*juez de control*) and the enforcement judge (*juez de ejecución de sentencias*). Most importantly, the control judge intervenes from the initiation of the investigation until the commencement of the oral trial. This judge is primarily responsible for ensuring that the rights of the victims, accused or witnesses are protected. Another very important

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<sup>112</sup> L. A. Rivas Tovar, G.A. Pérez Rojas, J. Blas Arriaga. Implantation of the Accusatory Criminal Justice System in Mexico. –40(56), Administración & Desarrollo, 2012, p. 13.

<sup>113</sup> González Obregón, *op. cit.*, p. 75.

<sup>114</sup> *Ibid.*, p. 74.

<sup>115</sup> *Ibid.*, p. 75.

function is to verify the legality of the detention of the accused as well as the legality of the actions of every official that takes part of the proceeding until the oral trial.<sup>116</sup> When requested by the prosecutor, the judge can also issue precautionary measures as means of protection if it considers that the safety of the victim is in serious peril.<sup>117</sup> Precautionary measures can also be issued to be certain of the presence of the accused in the proceedings.<sup>118</sup> Moreover, the control judge can also approve agreements in the alternative resolution methods. The new system contemplates mediation or conciliation so the dispute can be solved promptly before the oral trial when it concerns a minor crime.<sup>119</sup> The judge may supervise the conciliatory agreements reached by the parties through alternative resolution methods. Additionally, the control judge is competent to issue judgments in the abbreviated procedure. The abbreviated procedure is settled through the process of plea bargaining.<sup>120</sup>

It can be concluded that the creation of the figure of the control judge is one of the most important developments in the criminal justice system. The primary function of the control judge is not to conduct the investigation, but to oversight the performance of the prosecutor to guarantee the complete observance and protection of the rights of the parties. This role contributes to a more transparent, efficient and protective justice system.

The transformation of Mexico's criminal justice system brings significant changes to improve investigations. Among the positive outcomes of the new accusatorial system is the fact that it requires the judges to be highly qualified. Besides, the procedures have become more efficient and effective since the principle of orality eases the workload of judges. Also, orality in the procedures has also helped to decrease the perception of corruption. The proceedings have become more transparent as all of the evidence is presented before the judge and only that evidence is taken into account for the final verdict.

Some of the main features of the accusatory system are the guiding principles which grant the victim and the accused with the opportunity to play a more active role during the hearings. For example, the parties can interact directly and orally with the judge at any point throughout the hearing.<sup>121</sup> The way the hearings are held makes the parties as well as the society in general to be

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<sup>116</sup> Juez de Control en México. Enciclopedia Jurídica Online.

<sup>117</sup> González Obregón, *op. cit.*, p. 84.

<sup>118</sup> *Ibid.*, p. 86.

<sup>119</sup> Rivas Tovar, Pérez Rojas, Blas Arriaga, *op. cit.*, p. 12.

<sup>120</sup> *Ibid.*, p.12.

<sup>121</sup> González Obregón, *op. cit.*, p. 9.

more involved in the functioning of the criminal justice system. As a result, it increases the legitimacy and credibility in the system.<sup>122</sup> In addition, the system offers the possibility to solve the conflicts through various alternative resolution methods. The objective of the methods is to have an expedite process and to prevent the same behavior being committed repeatedly.

Furthermore, Mexico made a major progress with the human rights constitutional reform in 2011. This goes hand-in-hand with the 2008 reform of the criminal justice system. The 2011 reform established the foundation for implementing international human rights standards and incorporating them into domestic law in Mexico. Among the most important elements of the reform is the requirement for the judges to analyze the compatibility of domestic laws and regulations and the ACHR (the American Convention on Human Rights)<sup>123</sup>, its additional protocols, and the jurisprudence of the Inter-American Court.<sup>124</sup>

Although the state has taken the necessary steps to achieve a stronger protection of human rights through the justice system, it was expected that the accusatory system provided a more successful outcome. In reality, the transition from the old inquisitorial system to the accusatorial system has faced major challenges. For instance, the process of implementation has been one of the main difficulties of the transition. The accusatorial system is not going to be fully implemented until the cases opened under the inquisitorial system are concluded, which is going to take years.

To give an instance, shortly before the transition deadline only prosecutors and judges had been fully trained. Even though the state had spent around US\$ 25 million in training the agents that work under the justice system, the other agents, such as public defenders, police officers and experts had not received necessary training.<sup>125</sup> This constitutes a major problem as the police officers along with the prosecutors are responsible for the most important aspects regarding the investigation in the cases. Therefore, the justice system requires specialized personnel in order to function. Yet, the police officers barely received an incomplete express traineeship with basic foundations but without the required specialization.<sup>126</sup>

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<sup>122</sup> *Ibid.*, p. 8.

<sup>123</sup> See the American Convention on Human Rights. Adopted 22.11.1969. e.i.f. 18.07.1978.

<sup>124</sup> *Ibid.*, p. 4.

<sup>125</sup> In 2016, 9.7% of experts, 36.2% of public defenders, 88.7% of police officers, and 94.4% of penitentiary staff have not received training. M. Meyer, X. Suárez-Enríquez. *Mission Unaccomplished, Mexico's New Criminal Justice System Is Still a Work in Progress*. Washington Office on Latin America, 2016, p. 4.

<sup>126</sup> A. Angel. *Seis Carencias que tiene el nuevo sistema penal acusatorio, según expertos*. Animal Político, 11.07.2017.



Moreover, the alternative resolution methods are not widely chosen over the normal proceeding. According to data of the Attorney General's Office (PGR), less than 10,000 cases out of a total of 83,000 have been solved through negotiation or any other alternative method.<sup>127</sup> The purpose to implement alternative methods was to allow solving less serious crimes in a more efficient manner. However, the authorities do not seem to be very comfortable implementing these methods as they rather continue carrying out the whole criminal procedure.

Regarding precautionary measures, the reform also established that a monitoring unit of precautionary measures would be created. Nevertheless, this has not yet been done. It is an essential component of the reform because its purpose is to evaluate the risk posed by the detainees, and thus, the judge would be able to issue the most appropriate precautionary measure.<sup>128</sup> In relation to this, Article 155 of the National Code of Criminal Procedures<sup>129</sup> states that a possible precautionary measure is to place an electronic locator to the detainee. Yet again, this measure cannot be used. First, the state has not acquired any electronic locators, and second, there is no monitoring unit of precautionary measures that can supervise them.<sup>130</sup>

A further challenge to the new accusatory system is to end the poor practices. The organization United Mexico Against Delinquency detected deficiencies or bad practices of judges, prosecutors, public defenders and public legal advisors in 94% of cases in the courts in Mexico City. Among the main failures are that orality is not favored, the principle of presumption of innocence is often violated and the prosecutors and legal advisors do not know how to perform under the new oral system.<sup>131</sup> These shortcomings are alarming because it demonstrates that the practices of the previous inquisitorial system that obstructed professional investigations still remain. Therefore, it can be concluded that if the justice system does not function properly, the rights of the civilian population are not protected, and this consequently poses an obstacle for the country in its path towards a strong democracy.

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<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> See the National Code of Criminal Procedures. e.i.f. 05.03.2014.

<sup>130</sup> *Ibid.*

<sup>131</sup> A. Daen. ¿Justicia? Un monitoreo ciudadano exhibe las fallas del Sistema Penal Acusatorio en la CDMX. Animal Político, 09.05.2017.

### 2.1.2. Legal Framework and Practice of the Military Justice System

In contemporary democracies, the function of the armed forces is to guarantee the country's security, sovereignty and national defense. This function must be exercised within a framework of rule of law, in conformity with national and international law and in line with the separation of powers and respect for human rights. For example, in Mexico the armed forces must act within the legal framework enshrined in the Constitution which establishes that military institutions depend directly on the executive power. This means the armed forces are subordinated to civil authority.<sup>132</sup>

In a democracy where the rule of law and the separation of powers prevail, civilian control over the armed forces consists of several elements, such as accountability, transparency, access to military information and, most importantly, keeping military jurisdiction to matters strictly related to the armed forces.<sup>133</sup>

In Mexico, the Secretariat of National Defense (SEDENA) is the institution responsible for managing the armed forces, both the army and the air forces. One of the main functions SEDENA is the administration of military justice. The military justice system is composed of the Supreme Military Tribunal, the Military Courts of Oral Proceedings, Military Detention Judges and Resolution Enforcement Judges. The military courts are composed only of military personnel with the exception of the public defender that can be civilian or military public defender. The rules and procedures of the military justice system are established in the Code of Military Justice.<sup>134</sup>

The Constitution as the superior body of fundamental principles regulates the structure of the government and sets the outlines and limits of the political power. It also describes the essential aspects of the society from a democratic point of view.<sup>135</sup> Some of these aspects are related to security matters that are also enshrined in the Constitutional text. It forms a hierarchy of tasks and fundamental norms within the government, including the very existence and fundamental powers of the armed forces. The legal framework and mandate of the armed forces was first established in the Constitution of 1917. Several articles were drafted in this regard with the intention to subject

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<sup>132</sup> S. T. Pedroza de la Llave. *La Reinterpretación Constitucional del Fuero de Guerra o Militar en el Marco del Estado Democrático*. –25(1), *Cuestiones Constitucionales*, 2011, p. 159.

<sup>133</sup> ¿Comandante supremo? La ausencia de control civil sobre las Fuerzas Armadas al inicio del sexenio de Felipe Calderón. Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C. –1(1), Mexico, 2008, p. 47.

<sup>134</sup> See Code of Military Justice. e.i.f. 31.08.1933.

<sup>135</sup> J. J. Fernández Rodríguez, D. Sansó-Rubert Pascual. El recurso constitucional a las Fuerzas Armadas para el mantenimiento de la seguridad interior: El caso de Iberoamérica. –43(128), *Boletín Mexicano de Derecho Comparado*, 2010.

the military power to the civil power, as well as to define its limits and functions, and to establish essential checks and balances.

First, Article 13 establishes the limits of military justice which prohibit the military tribunals from having jurisdiction over civilians. Then, Article 89(VI) gives the power to the President to use the armed forces for internal security matters as well as for national defense. This provision specifically establishes the subordination of the members of military under the power of civil authority represented by the executive power. Furthermore, Article 129 sets out that no military authority may, in time of peace, perform any functions other than those that are directly connected with military affairs. Yet, the Constitution foresees the possibility that the army, the navy and the air force act in support of the civil authorities in tasks of public security. The conditions for this to happen include, first and foremost, that the civil authorities make a direct and well-founded request to the military authorities. This request has to be explicit that while supporting the civil authorities in public security tasks, the military will remain subordinated to them. Consequently, that means that the military power still remains subject to the fundamental principles embedded in the Constitution, as well as the laws that emanate from it and the treaties.<sup>136</sup> Despite the fact that constitutionally it is possible for the armed forces to act in support of the civil authorities, this particular condition has not been thoughtfully respected. On the contrary, since 2006 it has been sorely abused as the military have widely taken control over of the police duties without a legal framework.

Until now, it has been common for the armed forces to assume jurisdiction to investigate cases involving egregious abuses against civilians, like enforced disappearances, torture, arbitrary detentions, and sexual abuses. The general practice is that the Federal Public Ministry and local prosecutors customarily refer the cases to the military courts, thus depriving the civilian judges of their competence. It is a systematic practice that affects the rights of victims and the ability to seek and obtain a remedy by a competent court in accordance with due process. In this regard, Cossío Díaz,<sup>137</sup> has expressed that the judiciary power is obliged to comply with the judgment of the Inter-American Court in the Case of *Radilla-Pacheco v. Mexico*.<sup>138</sup> This case establishes that military officers who commit crimes against civilians in their tasks of keeping security and fighting against crime should be judged by civilian and not by military authorities.

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<sup>136</sup> M. Carbonell. El rol de las Fuerzas Armadas en la Constitución Mexicana. –8(1), Ius et Praxis, 2002.

<sup>137</sup> José Ramón Cossío Díaz is a Mexican Jurist and was an associate judge of the Mexican Supreme Court (2003-2018).

<sup>138</sup> Case *Radilla-Pacheco v. Mexico*, Judgment, Inter-American Court of Human Rights, 23.11.2009.

Mexico, as a state party to the ACHR, is under the obligation to respect and protect the rights and freedoms of its nationals. More specifically Article 8(1) and Article 25 of the ACHR recognize the right to a fair trial by a competent, independent and impartial tribunal and the right to judicial protection which guarantees the possibility of judicial remedy. It is very problematic to prosecute civilians in the military jurisdiction because there is both actual as well as perceived conflict of interest deriving from the military judges giving verdicts on their own personnel. Fundamentally, the military justice system lacks the necessary framework to investigate and to judge cases of alleged violations in an independent and impartial way.<sup>139</sup> It is for that reason that two different jurisdictions exist, for military and civilian matters respectively, and as a consequence, they are two separate justice systems with their own framework of laws and their own distinct object.<sup>140</sup> Moreover, the Inter-American Court jurisprudence has also asserted that when a state has ratified the ACHR, its judges, as part of the state apparatus are subject to it. Therefore, the judges are under the obligation to ensure that the effects of the provisions of the ACHR are not undermined or ignored by the application of laws contrary to the ACHR.<sup>141</sup>

Another serious consequence of exercising military jurisdiction over civilians is that impunity remains. When the military authorities carry out the investigations and as a result acquit the military officials in military courts, this prevents them from being tried before the civilian courts based on the principle *non bis in idem*.<sup>142</sup> The maintenance of such practices implies an obvious risk that the general feeling of impunity will persist. This, in turn, jeopardizes the prospect of enhancing public security.<sup>143</sup> For example, in the case *La Cantuta v. Perú*.<sup>144</sup> the Inter-American Court observed that the state played an important role in obstructing the investigation in the ordinary jurisdiction, supporting instead the military justice intervention. The Court therefore pointed out that concealment and obstruction on behalf of the state prove the existence of a general sense of impunity.<sup>145</sup> This illustrates a reality that also exists in Mexico where the support and acquiescence

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<sup>139</sup> The cases of Francisca Santos and Victoriana Vázquez (indigenous Mixtecs), Valentina Rosendo Cantú and Inés Fernández (Indigenous Tlapanecs), Ana, Beatriz and Celia González Pérez (indigenous Tzeltales), all of them sexually assaulted by members of the Mexican Army, show that military justice lacks independence and impartiality and that it is not an efficient mechanism to investigate the facts and prosecute the alleged perpetrators. ¿Comandante supremo? La ausencia de control civil sobre las Fuerzas Armadas al inicio del sexenio de Felipe Calderón. Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C. p. 49.

<sup>140</sup> H. C. Carbaugh. Separateness of Military and Civil Jurisdiction a Brief. –9(4), J.Am. Inst. Crim. L. & Criminology 571, 1919.

<sup>141</sup> Case *Almonacid Arellano y otros v. Chile*, Judgment, Inter-American Court of Human Rights, 26.09.2006, para. 124.

<sup>142</sup> Impunidad Uniformada, Uso indebido de la justicia militar en México para investigar abusos cometidos durante operativos contra el narcotráfico y de seguridad pública. Human Rights Watch. 29.04.2009.

<sup>143</sup> *Ibid.*

<sup>144</sup> Case *La Cantuta v. Perú*, Judgment, Inter-American Court of Human Rights, 29.11.2006.

<sup>145</sup> Pedroza de la Llave, *op. cit.*, p. 172.

of the state for these illegal practices undermine the justice system and democratic values. Consequently, it can be argued that Mexico cannot be considered a full democracy because the separation of powers between the civil and the military power does not prevail.

Due to the absence of transparency in the system, the state is far from achieving its obligation to condemn military personnel for committing abuses against civilians. Whenever there is a case involving a flagrant violation of human rights of civilians, SEDENA, through the media, vaguely compromises to investigate the facts, and then usually does not give a thorough and comprehensive description of the facts of the case. On the contrary, it considers that the cases must stay confidential until a final judgment is reached. All information regarding the status of the cases of abuses committed by military members against civilians that are being investigated before the military tribunal is absolutely restricted to the public. Only those who are parties in the proceeding, such as the prosecutors, the public defenders, the accused and the victim have access to that information. However, very often the victims are reluctant to participate in the proceedings because of the fear of reprisals for testifying in front of military judges about violations and abuses perpetrated by their own personnel.<sup>146</sup>

In some cases, SEDENA has granted compensation to the victims but frequently the victims do not fully obtain the appropriate compensation for the damage that has been caused.<sup>147</sup> For example, according to several cases analyzed by Human Rights Watch, the military justice system tends to bring the investigations to an end arguing that it had not found enough evidence to convict the military members of any crime or they invoke statute of limitations on those particular crimes that are being investigated.<sup>148</sup> In general, when there is no transparency and no accountability mechanisms in the justice system, the chances of obtaining justice are very slim.<sup>149</sup>

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<sup>146</sup> Impunidad Uniformada, Uso indebido de la justicia militar en México para investigar abusos cometidos durante operativos contra el narcotráfico y de seguridad pública. Human Rights Watch. 29.04.2009.

<sup>147</sup> ¿Comandante supremo? La ausencia de control civil sobre las Fuerzas Armadas al inicio del sexenio de Felipe Calderón. Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C. p. 27.

<sup>148</sup> Impunidad Uniformada, Uso indebido de la justicia militar en México para investigar abusos cometidos durante operativos contra el narcotráfico y de seguridad pública. Human Rights Watch. 29.04.2009.

<sup>149</sup> An investigation carried out by WOLA revealed that between 2012 and 2016, civilian prosecutors had opened 505 investigations regarding crimes and human rights violations committed by combatants but there have been only 16 convictions. Mexico Events of 2018, World Report 2019, Human Rights Watch.

The lack of transparency in the system essentially prevents the society from realizing how effective the military justice system is and to what extent the members of the armed forces are being held accountable of their crimes. As the number of cases of violations committed by the military is rising, it indicates that there are no real measures of non-repetition against military abuses.<sup>150</sup> The practices of the military justice system constitute a complete contradiction to the Constitution and the international treaties that protect and guarantee the fundamental rights of the civilians. This environment of systematic and endemic impunity has remained the norm causing irreparable damage to the society and causing a major setback to the development of the country.

Finally, another problem that undermines the effectiveness and transparency of the system is that the military judges are denied judicial tenure unlike judges in the civil jurisdiction or the Supreme Court. Yet, the Code of Military Justice does establish that the judges are subject to the same rotation policies as other members of the armed forces. This aspect is crucial at the moment of rendering a judgment because it suggests that the judge could be biased in order to deliver a judgment that will satisfy the requests of his/her superior in rank. Therefore, it can also compromise the independence of the judges as they might fear being removed from their position or that their professional career can be hindered if a judgment does not please the views of the minister of defense.<sup>151</sup>

### **2.1.3. Legal Challenges of the Code of Military Justice**

In 1933, President Abelardo L. Rodríguez, was granted an extraordinary power by the Congress to issue laws and regulations related to the armed forces. The President then issued the Code of Military Justice that as of today remains in force. Yet, Article 73(XV) of the Constitution confers the authority to prescribe the laws and regulations regarding the National Guard exclusively to the legislative power and prohibits the delegation of it to the executive power.<sup>152</sup> Since the Code was not discussed in an assembly at the Congress, it has raised doubts whether the Code is constitutional as it was not issued according to the proceeding set forth in the Constitution.<sup>153</sup>

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<sup>150</sup> Between December 2012 and January 2018, the CNDH received more than 4,600 complaints regarding alleged abuses by the military. Mexico Events of 2018, World Report 2019, Human Rights Watch.

<sup>151</sup> Impunidad Uniformada, Uso indebido de la justicia militar en México para investigar abusos cometidos durante operativos contra el narcotráfico y de seguridad pública. Human Rights Watch. 29.04.2009.

<sup>152</sup> See the Constitution of Mexico. Adopted 31.01.1917. e.i.f. 05.02.1917.

<sup>153</sup> ¿Comandante supremo? La ausencia de control civil sobre las Fuerzas Armadas al inicio del sexenio de Felipe Calderón. Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C. p. 51.

Even more importantly, Article 49 of the Constitution establishes the separation of powers and how these powers should never be united in one single person or entity. This article also clarifies that the legislative power shall never be vested in one individual except in the case of extraordinary powers granted to the executive. However, these extraordinary powers conferred to the executive are only granted in the event of emergency, invasion or disturbance of the public order.<sup>154</sup> Nonetheless, Mexico was not facing any of these circumstances when the Code entered into force. Consequently, it can be argued that the Code of Military Justice could be considered unconstitutional also because there was no condition that would have had allowed granting extraordinary powers to the President in order to issue laws related to the armed forces.

On the other hand, there has been a debate among different international bodies like the Inter-American Court, the Inter-American Commission on Human Rights (the Commission) and the UN Committee against Torture regarding the content of some provisions of the Code of Military Justice.<sup>155</sup> For example, the Inter-American Court has issued four legally binding rulings requiring the amendment of Article 57(II) clause a).<sup>156</sup> This Article regulates the use of military jurisdiction and defines what can be considered as an offense against the military discipline. Nonetheless, this provision has been traditionally interpreted by the military authorities to give itself jurisdiction over cases where combatants commit abuses and human rights violations against civilians. Consequently, it subjects the victims to a jurisdiction without independence and impartiality where there is not enough protection of their fundamental rights.<sup>157</sup>

Moreover, Article 57 of the Code can also be considered unconstitutional because it does not guarantee the protection of the rights established in Articles 14 and 16 of the Constitution. Frequently the combatants commit acts where fundamental rights are violated outside the context of a service. Therefore, it is disputable how it can be considered that combatants carry out illicit conducts against civilians in an act of service and how can they be tried before military courts when they commit such acts.<sup>158</sup>

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<sup>154</sup> See the Constitution of Mexico.

<sup>155</sup> See Report no. 53/01, Ana, Beatriz and Celia Gonzalez Perez. Inter-American Commission on Human Rights, Mexico, 04.04.2001. and *La Desaparición Forzada en México: Una Mirada desde los Organismos del Sistema de Naciones Unidas*. Naciones Unidas Derechos Humanos Oficina del Alto Comisionado, coedición de la ONU-DH México y la CNDH, México, 2015, p. 134. para. 88 j).

<sup>156</sup> M. Maureen, C. Boggs. Why Mexico should Reform its Military Code of Justice. Washington Office on Latin America, 24.09.2013.

<sup>157</sup> ¿Comandante supremo? La ausencia de control civil sobre las Fuerzas Armadas al inicio del sexenio de Felipe Calderón. Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C. p. 55.

<sup>158</sup> *Ibid.*, p. 54.

As a result of national and international pressure from governmental and non-governmental organizations, President Calderón presented a bill in 2010 which excluded only the crimes of enforced disappearance, torture and sexual assault from military jurisdiction.<sup>159</sup> Other types of human rights violations that are often committed by the armed forces performing public security tasks were not considered, such as arbitrary arrests, extrajudicial executions or raids.<sup>160</sup>

In 2012, in compliance with the judgment by the Inter-American Court in the case *Radilla-Pacheco v. Mexico*,<sup>161</sup> the Supreme Court declared Article 57 of the Code unconstitutional. It also requested it to be reformed so that the cases involving human rights violations committed by members of the armed forces would be investigated and prosecuted in the civilian courts instead of military courts.<sup>162</sup>

Even though Articles 37, 49bis, 57 and 129 of the Code were reformed in 2014, it was not done properly because those provisions continue to hinder civilian investigations in various ways. For example, Article 37 enables the military authorities to be the first ones to conduct the investigation when a crime has been committed by a member of the armed forces. Only after the military have started the investigation, they notify the civil authorities about the case. This kind of practice obstructs the delivery of justice as it ends up in multiple investigations that are not conducted appropriately.<sup>163</sup> Additionally, Article 57 remained incompatible with the text of Article 13 of the Constitution. Article 57 continues to be broad and vague and still does not fulfill the requirements set in the Court's rulings. Furthermore, Article 49bis confers tasks to the military investigators, such as interviewing and protecting witnesses, ensuring the chain of custody, and preserving crime scenes, even though these tasks should belong to civilian investigations when there are civilians involved. In addition, Article 129 allows the detention of combatants who were charged with crimes and human rights violations against civilians in military prisons. Consequently, this can be a hindrance for civil authorities because it makes it more difficult to conduct interviews and obtain testimonies for their investigations.<sup>164</sup> The reforms to the Code of Military Justice can be seen as a

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<sup>159</sup> V. Ballinas, A. Urrutia. Envía Calderón al Senado iniciativa de reforma al Código de Justicia Militar. La Jornada. 19.10.2010.

<sup>160</sup> Jurisdicción militar: Impunidad y violaciones a los derechos humanos. Comisión Mexicana de Defensa y Promoción de los Derechos Humanos A.C. 2013, p. 4.

<sup>161</sup> See case *Radilla-Pacheco v. Mexico*, Judgment, Inter-American Court of Human Rights, 23.11.2009.

<sup>162</sup> Maureen, Boggs, *op. cit.*

<sup>163</sup> X. Suarez-Enriquez, M. Meyer. Overlooking Justice: Human Rights Violations Committed by Mexican Soldiers against Civilians are Met with Impunity. Washington Office on Latin America, 2017, p. 14.

<sup>164</sup> *Ibid.*, p. 15.



positive step forward. Nevertheless, further reforms are required in order to be in conformity with the Constitution and the international human rights instruments that Mexico stands for.

## **2.2. Attempts to Legalize the Use of the Armed Forces in Civilian Law Enforcement**

### **2.2.1. Internal Security Law**

In December 2017, the Congress enacted the Internal Security Law (ISL)<sup>165</sup> in order to grant legitimacy and to establish clearer rules to the functions and tasks entrusted to the armed forces. The ISL sought to normalize the use of the armed forces in matters of public security by allowing the army and the navy to legally act as a civil force indefinitely. While the ISL intended to legalize the role of the armed forces in public security matters, it lacked necessary safeguards to protect human rights enshrined in the Constitution and in the treaties.

The law extended the role of the armed forces and determined the situations where they could legally act in civilian matters, including domestic law enforcement.<sup>166</sup> For that matter, the armed forces were granted with discretionary powers to create and implement security policies ranging from identifying internal security threats and the way to react to them, to the command of security operations and the gathering of intelligence from civil authorities.<sup>167</sup>

However, the law did not include procedures for the civil authorities to oversee the functions performed by the armed forces during internal security operations. Neither did the law establish accountability mechanisms for combatants who commit abuses and violations of human rights during the military operations.<sup>168</sup> As a result of such deficiencies, the CNDH, Mexico's National Institute for Transparency, Access to Information and Protection of Personal Data (INAI) among other national bodies, lodged an action of unconstitutionality before the Supreme Court against several provisions of the ISL.<sup>169</sup> An action of unconstitutionality is a means of control of the constitutionality of laws. It alleges a contradiction between the challenged law, in this case the ISL, and the Constitution. In Mexico, this process can only be reviewed by the Supreme Court.

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<sup>165</sup> Internal Security Law. e.i.f. 21.12.2017. The Law was declared invalid by the Supreme Court in 15.11.2018.

<sup>166</sup> See Internal Security Law.

<sup>167</sup> X. Suarez-Enriquez, M. Meyer. Nueva Ley de Seguridad Interior enfrenta fuerte rechazo en México. Washington Office on Latin America, 26.01.2018.

<sup>168</sup> *Ibid.*

<sup>169</sup> Organismos, partidos, municipios y legisladores, ¿qué impugnan contra la Ley de Seguridad?. Animal Político, 20.01.2018.

The action of unconstitutionality included several significant arguments. First, it argued that the ISL approved the subordination of civil authorities to the military. Hence, violating Article 21 of the Constitution which specifically establishes that the matters of public security are a function that pertains to the civil authorities and to the judicial power.<sup>170</sup> Also, it was argued that the law provided more extensive faculties to the armed forces to have recourse to any legal means to gather intelligence and information from civil institutions which, as a result, violates the citizens' protection of personal data.<sup>171</sup>

Moreover, the ISL granted to the executive power the authority to order the intervention of the armed forces when there would be a threat to internal security. In addition, the President could order the intervention while only discussing the matter with the National Security Council.<sup>172</sup> Even though the law established that the intervention shall only be temporary and should not exceed one year, the President had been vested with enough power to extend the permanence of the armed forces when he/she considered that the threat to internal security continued to exist. Therefore, it can be argued that the permanent presence of the armed forces on the streets could indubitably consolidate a policy of militarization of the country.

On the other hand, the law did not include the principles of absolute necessity or strict use of force by the armed forces. On the contrary, it conceded combatants to make use of their military training, which is remarkably alarming since the law also foresaw an increase of the role of combatants in response to civilian protests.<sup>173</sup> This means that military intervention could be requested during social protests as they can be considered a threat to internal security. Therefore, it could be possible that the citizens feel intimidated or restrained to exercise their freedom of expression as they could be deemed as foes. The militarization of public security can put the core democratic values in jeopardy, destabilize the country and make it difficult to protect the rights of the citizens. In connection with this, it is important to mention that the definition of internal security in the ISL is very broad, making it highly susceptible to misinterpretations which could possibly lead to abuse in a significant number of situations.

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<sup>170</sup> See the Constitution of Mexico.

<sup>171</sup> See Article 30 of the Internal Security Law.

<sup>172</sup> Press Release DGC/018/18. Presentó CNDH ante la SCJN una acción de inconstitucionalidad contra diversos artículos de la Ley de Seguridad Interior que ponen en riesgo libertades y derechos humanos de los gobernados. Comisión Nacional de los Derechos Humanos. Mexico, 19.01.2018.

<sup>173</sup> Suarez-Enriquez, Meyer. Nueva Ley de Seguridad Interior, *op. cit.*, 26.01.2018.

Moreover, Article 9 of the ISL established that any information regarding the law's enforcement would be confidential because it is considered as a matter of national security. However, the classification of information about the military practices poses an obstacle for the civil authorities to supervise them and contributes to the current climate of impunity given the lack of mechanisms to hold military personnel accountable when they commit wrongdoings.<sup>174</sup>

Also, Article 20 of the ISL established that whenever the armed forces were deployed in interior security operations, the President would assign a military commander proposed by the armed forces that would devise the plan of action, assigned the tasks and coordinated the military and civilian authorities that were involved.<sup>175</sup> Therefore, this provision of the law reaffirmed that the armed forces would not be appointed to perform an auxiliary role in public security, but instead they could replace civil authorities in their tasks. Consequently, the absence of effective civilian control over the armed forces would enable the military to act with even more autonomy, opacity and impunity.

Some organs of the UN, the Inter-American Court, the CNDH, international human rights organizations and justice groups exhorted President Peña Nieto to turn down the law.<sup>176</sup> In response to the pressure, the President stated in early 2018 that the law would not enter into force until the Supreme Court reviewed its constitutionality. In November 2018, the Supreme Court declared the ISL invalid and unconstitutional because it sought to normalize the use of the armed forces in matters of public security.<sup>177</sup> This would compromise Mexico's obligations, such as to promote, respect and guarantee the rights enshrined in the Constitution. Also the Court stated that the faculties and tasks of the armed forces given by the law are too comprehensive and therefore it allows the armed forces to act without limitations. Hence, the law strengthened the idea that the armed forces should be turned into police forces by allowing them to participate in civilian matters, such as civilian criminal investigations. Lastly, the Court declared that the Constitution does not authorize the Congress to legislate on matters related to internal security and external defense. Instead, the executive power is the one entitled to dispose of the army, the navy and the air force.

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<sup>174</sup> *Ibid.*

<sup>175</sup> See Internal Security Law.

<sup>176</sup> X. Suarez-Enriquez, M. Meyer. Multiple Sectors Push Back Against the Implementation of Mexico's New Internal Security Law. Washington Office on Latin America, 25.01.2018.

<sup>177</sup> A. Angel. Corte invalida Ley de Seguridad por el riesgo que implica convertir a militares en policías. *Animal Político*, 15.11.2018.

The final decision of the Supreme Court can be deemed as a step in the right direction. It corroborates that the ISL would only undermine the efforts to strengthen and professionalize civilian police forces. The terms of the law did not provide any direct benefit to the society in general but, on the contrary, it posed a risk to human rights because the armed forces lack appropriate training to deal with civilians. As a consequence, the ISL could be regarded as a continuation of a failed policy on security. The militarization of the country has led to a detrimental impact on the rule of law. The presence of the armed forces in the streets for the last decade has not reduced crime. Instead the crime rate has soared dramatically.

### **2.2.2. Analysis of Legal Options for Reinforcing Public Security Forces**

The new President López Obrador proposed the creation of a National Guard with the aim to develop an alternative to the use of the armed forces to fight against organized criminal organizations already during the presidential campaign.<sup>178</sup> The National Guard is intended to be the fundamental institution to prevent crime, to further public security and to fight against crime. President López Obrador stated in his National Peace and Security Plan 2018-2024 that this new institution will allow rectifying the legal vacuum in which the armed forces have been performing in auxiliary roles to support civil police in public security functions.<sup>179</sup>

In March 2019, several Constitutional amendments were approved that pave the way for the framework for a National Guard.<sup>180</sup> Among the most important amendments was the annulment of para. (XV) of Article 73. The para. (XV) established the exclusive authority of the legislative power to prescribe the laws and regulations regarding the National Guard and prohibited the delegation of it to the executive power. This can be regarded as a possible overlap in the functions of the executive and the legislative power if both would be allowed to regulate the use of armed forces.

The government has so far allocated around US\$ 767 million to finance the first year of operations of the National Guard. The current administration also plans the construction of 87 bases for the new Guard.<sup>181</sup> Initially, this new institution will consist of around 35,000 members that will come

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<sup>178</sup> Mexico: Military Policing Threatens Rights, López Obrador's Proposal Dangerously Misguided. Human Rights Watch. 16.11.2018.

<sup>179</sup> National Peace and Security Plan 2018-2024. Drafted by the incumbent President Andrés Manuel López Obrador. Accessible: [https://lopezobrador.org.mx/wp-content/uploads/2018/11/PLAN-DE-PAZ-Y-SEGURIDAD\\_ANEXO.pdf](https://lopezobrador.org.mx/wp-content/uploads/2018/11/PLAN-DE-PAZ-Y-SEGURIDAD_ANEXO.pdf) (18.03.2019)

<sup>180</sup> Articles 10, 16, 19, 21, 31, 35, 36, 73, 76, 78 and 89 of the Constitution will be reformed to create a National Guard.

<sup>181</sup> P. Corcoran. Nueva Guardia Nacional de México: ¿un uniforme más? InSight Crime. 20.03.2019.

from the military, naval police and the federal police. In addition, civilians and active troop members will be invited to be part of the National Guard expecting that the Guard reaches 50,000 members.

It was established that officers of the Mexican army and the navy will be in charge of the operational command of this new institution. For this reason, it was also decided that the National Guard will share the same outline of hierarchy and ranking as the armed forces.<sup>182</sup> Even though the institution maintains the military component, the Guard will be of civil nature and is going to be under a civil control of the Ministry of Public Security which is integrated by SEDENA and SEMAR and the Secretariat of Security and Citizen Protection.<sup>183</sup>

The National Peace and Security Plan also established that the new security corps will receive practical training provided by the Military Education System on police procedures, the use of force, criminal law, human rights, gender perspective, first aid and civil protection.<sup>184</sup> In order to achieve this, the National Law to Regulate the Use of Force is one of the complementary laws that the Congress has to draft and approve when the Constitutional reform enters into force. This law is expected to establish the purpose and scope of the legitimate use of force. A second law that needs to be formulated is the National Law of the Registry of Detentions. This law is intended to establish a registry in cases of detentions, and it will determine the specifics of the registry, the treatment of personal data, the persons authorized to access the database, etc.<sup>185</sup>

The President declared that the aim of the National Guard is the gradual demilitarization of the country by withdrawing the armed forces that are currently undertaking tasks of public security. This will allow the armed forces to return to their constitutional functions, such as national and external defense of the country.<sup>186</sup> Hence, a three-year term was established for the Guard to be fully functional. To attain the demilitarization of the public security, a five-year term has been established, so that the military can return to their barracks. This timeframe notwithstanding, the current administration has not been clear on which will be the plan of action to realize this.<sup>187</sup>

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<sup>182</sup> National Peace and Security Plan 2018-2024. p. 17.

<sup>183</sup> Las 10 claves para entender qué es la Guardia Nacional. Milenio Digital. 17.01.2019.

<sup>184</sup> National Peace and Security Plan 2018-2024. p. 17.

<sup>185</sup> V. Alemán. El PRD madruga con ley que reglamenta Guardia, Propone crear la Ley Nacional de Registro de Detenciones. Excelsior. 17.03.2019.

<sup>186</sup> Las 10 claves para entender qué es la Guardia Nacional. Milenio Digital. 17.01.2019.

<sup>187</sup> National Peace and Security Plan 2018-2024. p. 18.

While the National Peace and Security Plan intends to create a legal framework as well as demilitarize the country, it lacks the clarity on how the National Guard will achieve its goals. For example, the Plan declared that the Guard was designed to guarantee peace in the country. Yet, the operational plan how the institution would contribute to a more secure and peaceful Mexico is not explained. Also, it mentions the eradication of corruption, but then again, there are no strategies or policies on how exactly the new institution will accomplish such objectives.

More importantly, the Plan does not even mention what would be the accountability mechanisms to hold the new security corps accountable in case they commit abuses against civilians. The lack of accountability mechanisms has increased the chance of the military to act with opacity for decades. This has been one of the key obstacles in the path of strengthening the protection of human rights. Experience in Mexico has shown that it is not possible to fight against crime without proper strategies and clear concepts that can differentiate the attributions and responsibilities of the authorities in charge of public and national security.

The previous administrations promised to revolutionize the fight against organized crime by implementing constitutional and institutional reforms, but ultimately, they did not have a positive impact in reducing violence. Consequently, the new President promised during his campaign that the National Guard would be different from anything else that has been tried by his predecessors. However, after an analysis of the National Peace and Security Plan, it can be concluded that it is deficient as there is not much depth in the planning of the function and institutional counterweights of the Guard, and more importantly, it does not differ much from the idea of the national militarized police force, or gendarmerie proposed by President Peña Nieto. The Plan also lacks substantial methods and strategies for accomplishing the demilitarization of the country over a longer term.

The creation of a National Guard has been heavily criticized by activists and academia because it is considered to continue the militarization of public security.<sup>188</sup> Its members still come from military bodies, such as the Military and Naval police, many being active members of the armed forces. The new security corps will be trained by the military and, even though the Guard is said to be of civil nature, it will still be commanded by SEDENA and SEMAR. In this sense, it can be said that there would not be a considerable change in the way of taking care of public security.

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<sup>188</sup> Mexico Must Consider Human Rights, Accountability Concerns When Implementing its New National Guard. Washington Office on Latin America, 28.02.2019.

Possibly the only difference will be that when the Law on the National Guard comes into force, the armed forces will finally have a legal framework that regulates their actions.

So far there are no guarantees that this new institution will truly be civilian. It can be written in the reform that the Guard will be of civil nature, however, it is important to remember that also the armed forces are supposed to be subject to civil control. This, however, has to a vast degree been ignored in practice. It can be argued that if the Guard is going to be so heavily influenced by the military, it will continue the same practices that have been taking place since the armed forces were deployed to fight against criminal organizations.

What is more, the creation of the National Guard will slow down and undermine the efforts to strengthen, restructure and professionalize civilian police forces of the country. Employing combatants for public security matters cannot serve as a substitution for the improvement of civilian police forces. Combatants and local police officers are not interchangeable. Civilian police are responsible for the application of laws and public stability, whereas combatants are trained to fight the enemy through the use of force. Particularly, combatants are not endowed with criminal investigative powers in cases concerning civilians and, moreover, they do not specialize to interact with the civilian population.<sup>189</sup> After more than a decade of having a permanent presence of the armed forces on the streets without having any success in reducing crime and violence, there are well-grounded doubts about the feasibility of transforming combatants into police.

In addition, the local police forces should not be disregarded, and more resources should be allocated to prepare them for effectively fighting against crime. By law, the police forces should be the ones in charge of public security. This includes safeguarding the rights of the people as well as the powers to investigate and prosecute crimes. In connection with this, when the Congress approves a Law on the National Guard, different functions of the civilian members and the military members of the Guard must be defined with clarity. The military members should only be allowed to act exceptionally and should not be allowed to participate in the investigation of crimes.<sup>190</sup> It goes without saying that the forthcoming Law on the National Guard has to fulfill international human rights standards in all respects.

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<sup>189</sup> Suarez-Enriquez, Meyer. *Overlooking Justice*, *op. cit.*, p. 15.

<sup>190</sup> ¿Qué significa para México la apobación de la Guardia Nacional?. Amnesty International. 06.03.2019.

At the moment, the public security model remains undefined. For the National Guard to function, several reforms are needed. First and foremost, accountability mechanisms and effective civilian control mechanisms must be in place. If both mechanisms are correctly implemented, the National Guard could prove to be a positive step in regard to the protection of human rights. Previous administrations used the armed forces without a legal framework and without accountability mechanisms to subject the armed forces to civilian control. The next chapter will demonstrate the consequences and risks related to the use of the armed forces without a proper public security strategy that protects human rights.



## CHAPTER III. HUMAN RIGHTS VIOLATIONS RESULTING FROM MILITARIZATION OF PUBLIC SECURITY

### 3.1. Militarization of Public Security in Practice and its Consequences

For decades the Mexican government has engaged in a fight against crime and criminal organizations. Since 1930, Mexico was governed by the hegemonic PRI that held the power for 70 years. During that time, drug-trafficking was deeply linked with and subdued to political power.<sup>191</sup> The arrangement between the government and the drug cartels was quite simple. The cartels needed to observe a set of rules called code of conduct in order to perform illegal activities.<sup>192</sup> The criminal organizations kept functioning discreetly and in an exceptionally disciplined manner up until 1990s by operating in the absence of major confrontations between each other.<sup>193</sup>

As Mexico was ruled by an authoritarian party, it functioned as a de facto centralized country capable of punishing the cartels in all different levels of government. Federal, state and local level were well-integrated and acted in harmony to punish a criminal organization whenever it was involved in a violent confrontation that could cause reputational damage to the country.<sup>194</sup> However, drug-related crime started to become a major problem since 2000 when the first multiparty democratic government was headed by the National Action Party (PAN).<sup>195</sup> The levels of government were controlled by different political parties after the 2000 elections and, as a consequence, decision-making became fragmented and ambiguous. The change in politics played a crucial role in setting the conditions for the criminal organizations to diversify and increased the proneness to violently fight each other.<sup>196</sup>

Since early 2000s an extensive role in public security has been entrusted to the military forces. The militarization of public security was administered in the absence of any solid legal grounds. When former President Felipe Calderón (2006-2012) formally initiated an aggressive war on drugs in

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<sup>191</sup> J. D. Rosen, R. Zepeda Martínez. *La Guerra contra el Narcotráfico en México: Una Guerra Perdida*. –94(1), 2015, p. 158.

<sup>192</sup> V. Rios Contreras. *How Government Structure Encourages Criminal Violence: The causes of Mexico's Drug War*. Doctoral dissertation, Harvard University 2013, p. 74. For example, some of the rules of the code were: (1) No dead people in the streets, (2) order and respect for territories and (3) no media scandals

<sup>193</sup> *Ibid.*, p. 70.

<sup>194</sup> *Ibid.*, p. 73.

<sup>195</sup> Rosen, Zepeda Martínez, *op. cit.*, p. 158.

<sup>196</sup> Rios Contreras, *op. cit.*, p. 92.

2006, the scale and intensity of violence increased throughout Mexico resulting in tens of thousands of casualties and people internally displaced.

The Calderón administration recognized the organized crime as a threat to national security and made it the top priority. The war on drugs formally commenced when the President launched the Joint Operation Michoacán sending federal police forces, combatants and members of the naval forces to fight criminal organizations in the state of Michoacán.<sup>197</sup> From that point, President Calderón also ordered the deployment of the armed forces throughout the states where drug-trafficking and violence were a dominant issue.

In order to combat criminal organizations, the Calderón administration endorsed a strategy of enhanced law enforcement with two main elements: (1) military intervention in several states of the country to support local police forces, and (2) to hunt down and eliminate the leaders of the cartels. The first element was the militarization of public security.<sup>198</sup> In this regard, President Calderón deployed some 50,000 military troops and an undefined number of navy members over different states to support the federal and local police forces.<sup>199</sup> Nonetheless, military personnel were not only supporting but extensively took over control of the duties generally performed by local police forces.<sup>200</sup> The armed forces were assigned to patrol the streets, set up and operate random checkpoints, operate permanently located checkpoints on the highways, destroy drug distribution centers, guarding and operating prisons, make arrests and raids. Likewise, the members of navy began managing customs operations in seaports.<sup>201</sup> By 2012, at least 32,000 members of the armed forces were carrying out tasks customarily executed by civilian forces.<sup>202</sup> In some instances military commanders and ex-commanders were appointed head of the public security agencies and other different local police institutions.<sup>203</sup>

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<sup>197</sup> A. Rodiles. Law and Violence in the Global South: The Legal Framing of Mexico's 'NARCO WAR'. Journal of Conflict and Security Law, Oxford University Press, 2018, p. 6.

<sup>198</sup> F. Enciso. Mexico's Worsening War Without a Name. International Crisis Group, 15.06.2017.

<sup>199</sup> Rodiles, *op. cit.*, p. 6.

<sup>200</sup> M. Stevenson. Mexican Congress Approves Law Allowing Army to Act as Police, AP News, 01.12.2017.

<sup>201</sup> G. W. Grayson. The impact of President Felipe Calderon's War on drugs on the armed forces: The prospects for Mexico's "militarization" and bilateral relations. U.S. Army War College, Strategic Studies Institute, USA, 2013, p.iii.

<sup>202</sup> Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Mexico. UN Human Rights Council (HRC), 2014, p. 6. para. 22.

<sup>203</sup> Militarización de la Seguridad Pública. Defensor Revista de Derechos Humanos, Comisión de Derechos Humanos del Distrito Federal, 2011, p. 20.

It could be argued that using military forces to take on police tasks is in some regards indispensable and helps to fight the surging criminal activity. Several aspects have been pointed out why there has been a positive impact on the fulfilling of police tasks. (1) Military members and ex-members of the armed forces have taken over traditional civilian posts in law enforcement agencies, while in some states and municipalities the previous chiefs of top security posts have resigned due to the danger imposed by the criminal organizations. (2) Many officers, such as generals, colonels or admirals that have been assigned to posts at local public security agencies had vast experience battling the organized crime. (3) In most of the cases the officers maintain a relationship with the current military commanders; this relationship helps the officers when they need to develop combat strategies, allowing them to perform joint operations or assaults against drug-trafficking organizations. (4) Due to their profession, military officers have become familiar with the usual tactics and strategies of the criminal organizations. (5) Military members come from a very strict environment of discipline and high standards and, therefore, it could help to improve the performance of the local police forces.<sup>204</sup> (6) Public opinion has supported the fact that military officers who have attained proper training and firm discipline in the armed forces are competent to take over security positions.<sup>205</sup> In fact, a public opinion survey on the perception of confidence in the authorities from 2018 revealed that over 80% of the people feel confident about the army and navy, whereas less than 50% are confident about the state police or municipal preventative police.<sup>206</sup>

On the other hand, the deployment of the armed forces on the streets to perform public security tasks endangers the principle of the use of force. This is one of the key principles of law enforcement that is rigorously followed by democratic states. While using force is indeed permitted in exercising statutory police tasks, it is strictly limited. Excessive use of force is prohibited by any means. The armed forces, however, are unequivocally trained for the maximum use of force. This is incompatible with the training of police forces and with the principle of the use of force as it is known in law enforcement. Empowering Mexican armed forces with regular police tasks undoubtedly puts the principle of the use of force in peril.<sup>207</sup> Because of their training, the combatants have little experience interacting with civilians.

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<sup>204</sup> Grayson, *op. cit.*, p. 23

<sup>205</sup> *Ibid.*, p. 33.

<sup>206</sup> Encuesta Nacional de Victimización y Percepción sobre la Seguridad Pública (ENVIPE 2018). Instituto Nacional de Estadística y Geografía (INEGI), 25.09.2018, p. 45.

<sup>207</sup> Militarización de la Seguridad Pública. Defensor Revista de Derechos Humanos, Comisión de Derechos Humanos del Distrito Federal, p. 7.

In addition, it is important to acknowledge that the purpose of the armed forces is to defend the country against external threats, to defend the integrity, independence and sovereignty of the nation. These are actions related more to the protection of the national security. Contrary to that, public security has a different nature, mainly to safeguard the integrity and the rights of the people, preserve public order and peace, etc. Consequently, these tasks should only be entrusted to civil forces. Hence, instead of entrusting tasks related to public security to the armed forces, strengthening civil police and reinforcing effective public policies under democratic principles would be more in line with the customary division of tasks between the armed forces and civil forces.<sup>208</sup>

Furthermore, it is paramount to comprehend that there are more issues involving the militarization of public security. Throughout the years members of the armed forces have fulfilled tasks of local police forces without any legal framework. The lack of legal framework also means that there are no proper mechanisms of accountability in case of serious human rights violations of the civilian population. The deployment of the armed forces has been linked with a dramatic increase in cases of enforced disappearances, extrajudicial executions, arbitrary detentions and torture. According to the National Human Rights Commission (CNDH), in the past years the claims for violations of human rights filed against military personnel have been increasing severely.<sup>209</sup> Examples of cases of human rights violations will be described below in sub-chapter 3.2.

The second element of the strategy launched by President Calderón was to chase down and eliminate the drug lords. As the drug lords were captured or killed, the cartels fragmented and diversified, leading to clashes among competing cartels over the control of the territory.<sup>210</sup> Because of the escalation in the intensity of confrontations between the armed forces and the cartels, the situation in Mexico as of 2017 was compared to armed conflicts in the territories of different countries like Afghanistan, Colombia, Iraq, Syria, Turkey and Yemen.<sup>211</sup>

It is crucial to acknowledge that this element of the strategy led to a dramatic increase in violence because Mexico lacked flexible local law enforcement that would have had the capacity to contain the emergence of smaller but more numerous new criminal actors that are involved in wider

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<sup>208</sup> *Ibid.*, p. 3.

<sup>209</sup> *Ibid.*, p. 49.

<sup>210</sup> Today around 60 to 80 competing criminal groups operate across the Country.

<sup>211</sup> A. Bellal. The war report, Armed conflicts in 2017, Geneva Academy of International Humanitarian law and Human Rights, 2018, p.17.

spectrum of criminal activities.<sup>212</sup> The levels of violence worsened both in qualitative and quantitative terms. Qualitatively, the methods of assassination evolved to an unprecedented level of cruelty. For instance, the cartels have started to bring tortured, dismembered and decapitated bodies to public display.<sup>213</sup> As a consequence of the cartel's fragmentation, they became deeply involved in other criminal activities against civilians that have expanded from the drugs business to kidnapping, human trafficking, extortion etc. Over recent years, they have also engaged in constant attacks against the state and security officials.<sup>214</sup> Quantitatively, the number of homicides increased particularly since President Calderón introduced the policy to fight the criminal organizations. The violence that started in the wake of the war on drugs has not come to a halt. Statistics revealed that the number of homicides had increased more than three times since 2006, reaching 33,300 in 2018.<sup>215</sup> Preliminary figures for 2018 indicate a further increase, breaking the record of the highest annual number of homicides for the second consecutive year.<sup>216</sup> Statistics clearly prove a colossal failure by the state to protect its citizens from the violence perpetrated by criminal organizations.

Former President Enrique Peña Nieto (2012-2018) promised to shift the focus of the security strategy that his predecessors had already tried against the organized crime. The focal point of his security strategy was crime prevention and decreasing criminal violence that have a direct effect on the civilian population rather than hunting down the cartel leaders.<sup>217</sup> In order to achieve his objective, Peña Nieto's administration put into effect another security strategy which involved the creation of a national militarized police force, or gendarmerie. The new security force was assigned to safeguard civilians from crime.<sup>218</sup> Nevertheless, it can be noted that Peña Nieto's administration security approaches were rather similar to President Calderón's.

The next crucial attempt to reinforce public security was made in December 2017. Despite criticism from national and international human rights organizations, the Congress approved the controversial ISL which would allow the army and the navy to legally act as a civil force indefinitely. President Peña Nieto faced domestic and international pressure, so he requested the

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<sup>212</sup> V. Rios. New Crime, Old Solutions: The Reason Why Mexico is Violent Again. Wilson Center, Mexico Institute. 04.02.2018.

<sup>213</sup> A. Schedler. The criminal subversion of Mexican Democracy. – 25(1), Journal of Democracy, 2014, p. 6.

<sup>214</sup> *Ibid.*, p. 7.

<sup>215</sup> C. Maxouris, N. Gallón. Mexico sets record with more than 33,000 homicides in 2018. CNN. 22.01.2019.

<sup>216</sup> Murders in Mexico rise by a third in 2018 to new record. Reuters, 22.01.2019.

<sup>217</sup> J. S. Beittel. Mexico: organized Crime and Drug Trafficking. Washington Congressional Research Service, 2015, p. 3.

<sup>218</sup> *Ibid.*

law to be reviewed by Mexico's Supreme Court to ensure that its provisions did not violate the Constitution prior to taking effect.<sup>219</sup> In 2018, the Supreme Court ruling overturned the ISL arguing that the law was unconstitutional, *inter alia*, because it sought to normalize the use of the armed forces in matters of public security which is contrary to Article 129 of the Constitution.<sup>220</sup>

Currently, the security situation in Mexico remains complex. The law enforcement institutions are weak and ineffective. The previous administration allocated a considerable amount of economic resources for national and public security. However, the results were not as expected.<sup>221</sup> So far, the outcome of the militarization of public security has resulted in increasing violence, social instability and systematic human rights violations.

In point of fact, there is mounting evidence of state abuse and collusion with the organized crime.<sup>222</sup> Even though the state is under domestic and international obligation to ensure the safety and protection of its citizens and their fundamental rights; enforced disappearances, arbitrary detentions, extrajudicial executions, torture and sexual violence committed by the military against civilians have become a regular feature of life. Consequently, the deficiencies in the legal system have fueled the risk of abuse by state agents and the military.

More importantly, non-derogable rights, such as the right to life<sup>223</sup> or the right to be free from torture and other inhuman or degrading treatment or punishment, are among the most violated rights by the armed forces. In addition, other rights, such as the right to privacy, right to personal liberty or right to a fair trial are predominantly breached not only by military officers but also by local authorities. While the majority of the homicides are drug-related, the ongoing life-threatening violence can be partly attributed to the state. In connection with that, the thesis will now turn its focus into documenting three cases to give examples on violations related to enforced

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<sup>219</sup> X. Suarez-Enriquez, M. Meyer. Multiple Sectors Push Back Against the Implementation of Mexico's New Internal Security Law, *op. cit.*, 25.01.2018.

<sup>220</sup> La SCJN declara inconstitucional la Ley de Seguridad Interior. Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C. Mexico, 15.11.2018.

<sup>221</sup> México gasta más de 77.000 millones de dólares en seguridad pero aumentan los crímenes. RT en Español. 19.07.2018.

<sup>222</sup> Schedler, *op. cit.*, p. 11.

<sup>223</sup> Even though right to life is a non-derogable right, it is subject to limitations in its application. Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Adopted 16.12.1966. e.i.f. 23.03.1976. states: Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. However, it is important to make clear that the use of the term arbitrarily means that in certain situations where it is necessary, reasonable and proportionate, the law enforcement authorities or the armed forces can use deadly force. Nevertheless, as chapter III will demonstrate, in most of the cases analyzed, there was no real justification for the authorities to use deadly force and consequently taking the life of the civilians.

disappearance, extrajudicial executions and torture respectively. The description of the cases aims to demonstrate how militarization of public security endangers the protection of human rights and undermines the rule of law. Furthermore, while military forces were deployed in the tasks of public security to protect the civilians, these cases cast doubt on whether any of such goals have been accomplished. In particular, the cases will illustrate how vulnerable the civilian population has become since the militarization of the country. Moreover, the widespread corruption and impunity that takes place within the criminal justice system are also revealed by the cases.

## **3.2. Adverse Implications on Human Rights Resulting from Inadequate Control of the Use of Armed Forces**

### **3.2.1. Enforced Disappearance**

In Latin America, enforced disappearances have traditionally been part of a strategy used by the armed forces, the security forces, intelligence services, or paramilitary groups that act with the involvement and tolerance of the state.<sup>224</sup> Contemporary Mexico is not an exception, with tens of thousands of cases documented<sup>225</sup> there is ample evidence suggesting that members of the army, navy, security forces and other public officials have participated in enforced disappearances.<sup>226</sup>

Experts from the UN, the CNDH and human rights activists have noticed that since the policy against drugs was launched, enforced disappearances have become a common occurrence in Mexico.<sup>227</sup> Usually, the cases tend to follow a consistent pattern where the victims are arbitrarily arrested by members of the armed forces or law enforcement agents, they are not informed of the reasons for their arrest, their arrest is not officially documented on the data bases of the police and they are not taken immediately before the relevant authorities. More serious still, the local authorities systematically misclassify the enforced disappearances cases as missing persons, kidnappings by drug cartels or they frequently blame the victims of having been targets due to their

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<sup>224</sup> La Desaparición Forzada en México: Una Mirada desde los Organismos del Sistema de Naciones Unidas. Naciones Unidas Derechos Humanos Oficina del Alto Comisionado, coedición de la ONU-DH México y la CNDH, México, 2015, p. 8.

<sup>225</sup> Statistics have revealed that at least 37,000 people disappeared since 2007. Mexico Must Summon Political Will to Fully Implement Law on Forced Disappearances. Washington Office on Latin America, 30.08.2018.

<sup>226</sup> Ni Seguridad, Ni Derechos, Ejecuciones, Desapariciones y Tortura en la “Guerra contra el Narcotráfico” de México. Human Rights Watch, México, 2011, p. 136.

<sup>227</sup> *Ibid.*, p. 138.

participation in criminal activities.<sup>228</sup> The misclassification is one of the main reasons why keeping accurate data on enforced disappearances is remarkably problematic.

Enforced disappearances remain widespread and often give the means to other human rights violations. Due to the increasing numbers of disappearances, the Congress approved the Law on Forced Disappearances in 2017.<sup>229</sup> However, since the law entered into force there has been a lack of political will to fully put it into practice. Yet, if implemented conscientiously, critical aspects concerning prevention, investigation and punishment for those responsible could be appropriately tackled. Albeit Mexico has ratified numerous international human rights treaties,<sup>230</sup> the state has not been able to act with due diligence to protect human rights and has, thus, failed to uphold its obligations under IHRL.

On the other hand, another serious issue is the state's failure to guarantee justice to victims and their families. Many cases of enforced disappearances perpetrated by military members are investigated and tried in the Mexican military justice system. Hence, it may well be the reason why no military officials have been convicted of this crime in the military courts.<sup>231</sup> This section will focus on the description and analysis of the case *Alvarado Espinoza y otros v. México*. This is the first case ever submitted to the Inter-American Court concerning enforced disappearance that has taken place as part of the operations against drug-related crimes carried out by the Mexican army.<sup>232</sup>

On December 29, 2009, in the municipality of Buenaventura, Chihuahua, Nitza Paola Alvarado Espinoza (Nitza) and José Ángel Alvarado Herrera (José) were arbitrarily arrested by ten-armed combatants while they were inside a vehicle outside a relative's house.<sup>233</sup> José's wife, Obdulia, was

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<sup>228</sup> *Ibid.*, p. 136.

<sup>229</sup> See Ley General en Materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas (General Law on The Forced Disappearance of Persons, Disappearance Committed by Individuals and The National Personal Search System). e.i.f. 17.11.2017.

<sup>230</sup> Mexico has ratified the following conventions: ICCPR, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted 10.12.1984. e.i.f. 04.02.1985. The International Convention for the Protection of All Persons against Enforced Disappearance. Adopted 10.12.1984. e.i.f. 26.06.1987. The American Convention on Human Rights (ACHR), The Inter-American Convention to Prevent and Punish Torture (IACPTT). Adopted 09.12.1985. e.i.f. 27.02.1987. The Inter-American Convention on Forced Disappearance of Persons. Adopted 09.06.1994. e.i.f. 28.03.1996.

<sup>231</sup> Ni Seguridad, Ni Derechos, Ejecuciones, Desapariciones y Tortura en la "Guerra contra el narcotráfico" de Mexico, Human Rights Watch, p. 151. As of August 2018, The Attorney General's Office had opened 1,255 investigations but only pressed charges in 11 cases but no convictions. Mexico Events of 2018, World Report 2019, Human Rights Watch.

<sup>232</sup> See Case *Alvarado Espinoza y otros v. México*, Judgment, Inter-American Court of Human Rights, 28.11.2018.

<sup>233</sup> Informe no.3/16, Nitza Paola Alvarado Espinoza, Rocío Irene Alvarado Reyes, José Ángel Alvarado Herrera y otros. Comisión Inter-Americana de Derechos Humanos, México. 13.04.2016. p. 13.



inside the house when she saw the members of the armed forces arriving in two pick-up trucks, beating José and then taking both away in the trucks. Later that day, Rocio Irene Alvarado Reyes (Rocio) was at home with her mother Patricia, her two younger siblings and her two-year old daughter, when the same ten-armed combatants burst into her home. Patricia and the children were threatened and locked in the bathroom. Afterwards, the combatants stated that Rocio was being arrested under the Joint Operation Chihuahua and was taken out of her house and then forced into a truck.<sup>234</sup> The whereabouts of the three victims remain unknown.

The relatives of Nitza, José and Rocio reported the situation to the community police and also to the local office of the State Attorney General, but the authorities declined to file a complaint. As the authorities were not helpful, the family itself went around the town to look for the victims but was unsuccessful.<sup>235</sup>

Finally, on December 31, 2009, the authorities from the local office of the State Attorney General received the complaint and told the relatives that “they had information three people were in the barracks of the 35th Infantry Battalion and were being investigated by the army”.<sup>236</sup> The family members went to the barracks to request information but upon arrival they were told no one had been detained and they did not have information about them.<sup>237</sup> After that, the family members filed complaints for the illegal deprivation of liberty of Nitza, José and Rocio by members of the military at the Federal Investigative Agency. However, at the agency the officers declared they were unaware of the victims’ detention. Later that day, the relatives reported the incident at the National Human Rights Commission of Ciudad Juárez.<sup>238</sup>

In January 2010, the family members filed another complaint at the Attorney General’s Office. While at the office, they heard someone saying that in fact the victims were detained at the military barracks. Subsequently, the relatives went to the Fifth Military Zone in Chihuahua City to report the arbitrary detention and enforced disappearance of Nitza, José and Rocio.<sup>239</sup>

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<sup>234</sup> *Ibid.*, p. 14.

<sup>235</sup> *Ibid.*, p. 16.

<sup>236</sup> M. Meyer, S. Brewer, C. Cepeda. *Abused and Afraid in Ciudad Juarez: An Analysis of Human Rights Violations by the Military in Mexico*. Washington Office on Latin America, Center PRODH, 2010, p. 7.

<sup>237</sup> Informe no.3/16, p.16.

<sup>238</sup> *Ibid.*, p. 16.

<sup>239</sup> *Ibid.*, p. 17.

In late January, the family members filled a new complaint under enforced disappearance instead of missing persons at the State Attorney General of Chihuahua. According to a family member, on February 3, Nitza called to a friend saying, “Please help me, get me out of here, I’m scared.”<sup>240</sup> The family reported this to the authorities, but they did not take it seriously and did not do an effective investigation about it.

During the alleged investigation, the family members were told in several occasions by different authorities and witnesses that the Lieutenant Colonel of the 35th Infantry Battalion, Elfego Luján Ruiz, committed illegal acts during the period he was Colonel such as the arbitrary detention and enforced disappearance of Nitza, José and Rocio.<sup>241</sup>

In April 2010, the case was taken under the military jurisdiction and several proceedings were conducted, such as testimonies of both civilians and combatants, analysis of documents from different law enforcement agencies, state and private institutions. In 2011, the Military Public Ministry stated based on their investigation that members of the Mexican army did not commit any illicit acts. In addition, the Ministry pointed that victims could have been targets claiming that they might have been involved in drug-trafficking. Having concluded this, they sent the case to the Federal Public Ministry so they could take on the investigation.<sup>242</sup>

Since the victims disappeared, their families had been threatened and intimidated by members of the Mexican army. According to family members, armed combatants had been seen patrolling outside their houses and several times they had been inside their homes conducting interrogations. In addition, José’s father had received death threats over the phone.<sup>243</sup> Another time, other family members were threatened to be killed if they did not leave the city. This threat was allegedly made by members of SEDENA. Other violent incidents happened, like when José’s brother, Jaime, was run over by a truck like the ones the armed forces drive. Lastly Jaime’s wife found out a note inside their ransacked house stating, “we will kill your family”. In 2011, after all these events, José’s father and twenty-one more family members decided to flee the city.<sup>244</sup>

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<sup>240</sup> Meyer, Brewer, Cepeda, *op. cit.*, p. 7.

<sup>241</sup> Informe no.3/16, p. 19.

<sup>242</sup> *Ibid.*, p. 24.

<sup>243</sup> *Ibid.*, p. 41.

<sup>244</sup> *Ibid.*, p. 43.

The victims' families felt the state failed to properly investigate with due diligence as none of the complaints and reports led to any progress in the investigation of the whereabouts or fate of Nitza, José and Rocio. On June 26, 2011, they filed an application with the Inter-American Commission on Human Rights. There were several reasons why the Commission decided the case involved the enforced disappearance of Nitza, José and Rocio by members of the Mexican army. There was enough evidence based on eyewitness, testimonies, statements of law enforcement authorities, contextual factors and various reports from several agencies that led the Commission to the conclusion that the victims were deprived of their liberty by members of the Mexican army.<sup>245</sup>

In its Merits Report, the Commission made several recommendations to Mexico, however after granting an extension of time to comply with the recommendations, the state has failed to do it. Therefore, on November 9, 2016, the Commission submitted the case to the Court's jurisdiction.<sup>246</sup> In November 2018, the Court rendered the final judgment where it found the state liable of gross violations of human rights of Nitza, José, Rocio and their close relatives and ordered the state to compensate the family of the victims.<sup>247</sup>

This case demonstrates the dangers of the militarization of public security and it proves how the state authorities have perpetrated systematic human rights violations. The deployment of the armed forces has not contributed to the safety of the population and neither has helped to reduce violence. On the contrary, it has led to grave abuses, impunity and human rights violations.<sup>248</sup> The numerous violations of human rights of both the direct victims and their families will be explained as following.

First of all, the victims' right to personal liberty and right to humane treatment was violated when members of the armed forces arbitrary deprived them of their physical liberty. More importantly, during the arrest, the combatants violated Article 16 of the Constitution which enshrines that no one shall be molested except by virtue of a written order issued by a competent authority describing the legal grounds and justification.<sup>249</sup> However, the victims were arbitrarily arrested without being

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<sup>245</sup> Press Release OAS, Inter-American Commission on Human Rights. IACHR Takes Case involving Mexico to the Inter-American Court, 22.11.2016.

<sup>246</sup> Informe no.3/16.

<sup>247</sup> See Case *Alvarado Espinoza y otros v. México*.

<sup>248</sup> Since the start of the so-called "war on drugs" around 235,000 people have been victims of homicide in the Country. During 2017, around 29,000 homicides were registered in the National Data Base of Criminal Incidence. In 2018 the numbers rose to more than 30,000 homicides, the highest annual tally ever recorded by the National System of Public Security.

<sup>249</sup> See the Constitution of Mexico.

informed of the grounds for their arrest. By analyzing the facts and evidence, it was proved that the competent authorities did not issue a written order of arrest against the victims. This is beyond doubt a grave violation of the fundamental rights protected by the Constitution and other human rights treaties.

In regard to the right to be free of inhuman treatment, eyewitnesses reported the victims were physically and verbally abused. Testimonies of the relatives that were present during the arrest informed that the victims and themselves were not treated with dignity and respect. Contrary, they were ill-treated and threatened by the combatants. Moreover, Article 19 of the Constitution states in its last paragraph that ill-treatment and abuse during the detention shall be punishable by law<sup>250</sup>, however, as of today, no member of the armed forces has been held accountable for the abuses and violations in this particular case.<sup>251</sup>

Concerning the right to life of the victims and based on the evidence and documentation of the case, there are strong indications that the victims might not be alive anymore. It has been nine years since their disappearance and there is no information about them or their whereabouts.

Another important aspect that contributed to the failure of the investigation were the proceedings violations. First, there was a lack of proper investigation within a reasonable time; the case was handled by various law enforcement agencies and there were plenty of in-progress case files in each agency which made the investigation ineffective and unsuccessful. In this regard, the Commission has emphasized that the states part of the Organization of American States (OAS) have the responsibility to provide easy, fast and efficient remedy to comply with this obligation.<sup>252</sup> However, the case was transferred to the military jurisdiction. As a result of that the families of the victims were deprived of the right to judicial protection to access a competent, independent tribunal to seek justice. According to Article 9 of the Inter-American Convention on Forced Disappearance of Persons, civilian investigations should be tried under the jurisdiction of ordinary law and all

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<sup>250</sup> *Ibid.*

<sup>251</sup> The Mexican government has only reported six federal court convictions for enforced disappearance in Mexico and many of these cases involved incidents that took place prior to 2007. Mexico's New Disappearances Law is an Important Step towards Ending the Disappearances and Impunity Crisis in the Country, Washington Office on Latin America, 12.10.2017. Accessible: Gob.mx Gobierno Federal, <https://datos.gob.mx/busca/dataset/victimas-de-incidencia-delictiva-del-fuero-comun?fbclid=IwAR0PsMKvlyC1LZQm12A1xXS0ajTxOkNGeJekNnr-U8ULDdqtTH-VPVfv04w>

<sup>252</sup> Derecho a la verdad en las Americas. Comisión Inter-Americana de Derechos Humanos, Organización de los Estados Americanos, 13.08.2014. p. 29.

other special jurisdictions, especially the military should be excluded.<sup>253</sup> In addition, Article 13 of the Constitution also prohibits the military tribunals to have jurisdiction over civilians.<sup>254</sup> Although the case was later transferred back to the ordinary jurisdiction, the period of time the case was under military jurisdiction was crucial for gathering vital information and evidence about the fate of the victims.

On the other hand, during the course of the investigation there were several means of cover-up and obstructions on behalf of the state authorities; as it was mentioned before, some authorities mentioned to the family members that they did have information about the victims and then later denied it. According to the Commission, the ACHR highlights that the families of the victims of enforced disappearance have the right to know the truth about what happened to their beloved ones.<sup>255</sup> The Office of the United Nations High Commissioner for Human Rights (OHCHR) has also stated that the right to know the truth about gross violations of human rights is an inalienable right linked to the obligation of the state to protect and guarantee human rights. Furthermore, it underlines the obligation of the state to conduct effective investigations, ensure adequate remedies and provide reparation for the victims and their families.<sup>256</sup> This right consists of two main aspects. First, the victims and their families have the right to the truth regarding the events that caused human rights violations. Second, those involved have the right to know the identity of those who perpetrated these violations.<sup>257</sup> The Court has pointed out that the deprivation of the right to the truth of the facts about the whereabouts of the disappeared persons constitutes a form of cruel and inhumane treatment for close relatives.<sup>258</sup>

Furthermore, the victims' families were constantly the objects of arbitrary interference with their private life, family and home. After the detention and disappearance of their relatives, they were under constant surveillance and harassment by members of the armed forces. They did not enjoy privacy even at their home because it was common for the combatants to show up there to threaten them. The imminent danger, intimidation and threats against them ultimately provoked the forced displacement of more than twenty family members.

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<sup>253</sup> See the Inter-American Convention on Forced Disappearance of Persons.

<sup>254</sup> See the Constitution of Mexico.

<sup>255</sup> Derecho a la verdad en las Americas, Comisión Inter-Americana de Derechos Humanos, 13.08.2014, p. 29.

<sup>256</sup> *Ibid.*, p. 18 para. 45.

<sup>257</sup> *Ibid.*, p. 33 para. 70.

<sup>258</sup> *Ibid.*, p. 30 para. 66.

In the light of the above, it can be concluded that the Mexico failed to protect and guarantee the fundamental rights enshrined in the Constitution as well as in human rights treaties. The massive and systematic violation of human rights and serious violation of IHRL by state agents and members of the military are a clear indication of the inability of the state to maintain public order and the security of the country. The government's failure to solve the case after almost nine years forced the family members to resort to international bodies to seek justice. The circumstances of the case prove a recurrent conduct where the members of the armed forces commit crimes and conduct illegal activities with the support and acquiescence of the state. Therefore, it can be concluded that the recursive violations of human rights and impunity for military abuses have led the country to retreat from the principles of rule of law.

### **3.2.2. Extrajudicial Execution**

Extrajudicial executions are not a recent problem in Mexico. Its background dates back to the 1960s and 1970s to the period known as the Mexican Dirty War. During that time the political party PRI, supported by the United States, carried out measures of military and political repression aimed at dissolving the movements of students as well as the political opposition and rural insurgents. Since then, enforced disappearances, killings, torture, and extrajudicial executions have been a systematic practice of the state through the armed forces.<sup>259</sup>

The situation has not changed considerably. Since the policy on public security was launched in 2006, the militarization of public security has been characterized by human rights violations, the blatant disregard for the international human rights standards and the lack of accountability mechanisms for the perpetrators. As a consequence of the war on drugs, the military personnel and local police have been prone to become subjects of threats from members of the organized crime. Therefore, it may be possible that some civilian deaths are the result of the legitimate use of force during the violent confrontations.<sup>260</sup> Nevertheless, the number of deaths due to extrajudicial executions involving excessive use of force has been rising every year.<sup>261</sup>

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<sup>259</sup> K. Doyle *et al.* The Dawn of Mexico's Dirty War: Lucio Cabañas and the Party of the Poor. The National Security Archive, The George Washington University, Washington, D.C., 2003.

<sup>260</sup> Ni Seguridad, Ni Derechos, Ejecuciones, Desapariciones y Tortura en la "Guerra contra el narcotráfico" de Mexico. Human Rights Watch, p. 174.

<sup>261</sup> According to documentation gathered by more than 20 human rights organizations, between 2006 and 2014 the total number of confrontations where SEDENA and SEMAR were involved was 3,500; resulting in a total of 4000 civilians' deaths. Las ejecuciones arbitrarias en México y su impunidad histórica. El Universal, 21.02.2018.

The state has been striving to prove the legitimacy of its public security strategy, but the reality has been that numerous homicides have been attributed to the state.<sup>262</sup> Therefore, in order to legitimize its actions, the state started to adopt a strategy to deny their character as victims. This means that the victims were classified as collateral damage<sup>263</sup> or as being part of criminal organizations without any prior investigation to support such claims.<sup>264</sup> The so-called collateral damage has been regarded as an outcome of the confrontations between the armed forces and the criminal organizations. Nevertheless, it has served as a pretext for the authorities to not take responsibility for their actions. Unfortunately, the number of victims that pertain to the category of collateral damage is outrageous. Even though no official statistics on the exact number of victims can be found, a great number of cases have been reported in newspapers.

In addition to that, the degree of impunity regarding extrajudicial executions is alarming as a large number of cases are not being investigated. However, when the cases are investigated, the relevant authorities tend to commit wrongdoings that include, *inter alia*, the ballistic examination or not bringing under interrogation the combatants or police that were involved. Besides, there has been an ongoing practice where the crime scenes are manipulated by the combatants or police in order to erroneously incriminate the victims as armed assailants/part of the organized crime or to conceal evidence of the excessive use of force.<sup>265</sup> The case that will be examined in this section is a model example of innocent civilians that were caught up in the middle of a crossfire between the armed forces and the organized crime and later were denied of their character as victims. The case was submitted to the CNDH in 2010.<sup>266</sup>

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<sup>262</sup> From 2012 to 2017 the CNDH has issued 9 recommendations addressed to different institutions including SEDENA and the Federal Police regarding the excessive use of force, torture, enforced disappearances and extrajudicial executions. Las ejecuciones arbitrarias en México y su impunidad histórica. El Universal, 21.02.2018.

<sup>263</sup> While the term collateral damage applies whenever there is an armed conflict regulated by IHL, it has been repeatedly used in Mexico by the civilian and military authorities and the media when incidental civilian losses have occurred. As the situation in Mexico is not considered a NIAC by the government and it is regulated under national laws and IHRL, the use of the term collateral damage would be inappropriate. However, in Mexico the use of the term collateral damage can be understood not in *sensu stricto* of just pertaining to an international armed conflict (IAC) or NIAC but more *sensu lato* as incidental civilian losses result of the clashes between the armed forces and cartels or in clashes between cartels.

<sup>264</sup> Víctimas de violaciones a derechos humanos. Defensor Revista de Derechos Humanos, Comisión de Derechos Humanos del Distrito Federal, 2013, p. 9.

<sup>265</sup> Ni Seguridad, Ni Derechos, Ejecuciones, Desapariciones y Tortura en la “Guerra contra el narcotráfico” de México, Human Rights Watch, p. 7.

<sup>266</sup> Recomendación no.45/2010, Sobre el caso de la privación de la vida de Javier Francisco Arredondo Verdugo y Jorge Antonio Mercado Alonso, estudiantes del Instituto Tecnológico y de Estudios Superiores de Monterrey, Campus Monterrey. Comisión Nacional de Derechos Humanos, México D.F., 12.08.2010.

On March 19, 2010, university students Javier Francisco Arredondo Verdugo (Javier) and Jorge Antonio Mercado Alonso (Jorge) were arbitrarily executed inside the premises of the Monterrey Institute of Technology and Higher Education (ITESM) during a clash between the Mexican army and alleged organized crime members. Members of the armed forces under the command of SEDENA, were patrolling the streets in Monterrey, Nuevo León, nearby the ITESM. Soon that night, the combatants were involved in a high-speed car chase where suspects started to attack the combatants from another vehicle with assault rifles and machine guns. The violent confrontation between the armed forces and the attackers took place outside the premises of the ITESM and lasted around forty-five minutes.<sup>267</sup>

Amidst the clash, a videotape from the ITESM security cameras filmed Jorge and Javier walking inside the premises of the university. Right after, the video showed military personnel from SEDENA going inside the Campus close to where the students were walking. A security guard from the Campus testified seeing the combatants shooting and later finding the students lying wounded and unconscious. The same videotape that recorded the last minutes of the students' lives also revealed how combatants destroyed other security cameras, quite possibly to get rid of the evidence of the crime they just committed. Furthermore, the head of security on Campus stated that a member of the armed forces demanded him to turn over the videotapes from the cameras that were not destroyed.<sup>268</sup>

Evidence also demonstrated that the crime scene was modified by the members of the armed forces with the intention to implicate the students as part of the organized crime and that they perished as a consequence of the clash. The forensic report also confirmed signs of torture. The victims were brutally beaten while still alive and then shot six and seven times respectively. The autopsy revealed that some of the gunshots were made at close proximity which contravened the facts stated by the combatants that the shooting occurred during the chase. Also, the combatants moved the bodies of the students into different positions and planted firearms on the bodies of the victims in order to make them look like armed assailants. As well, the victims' IDs and their belonging were missing. It could be assumed they were stolen for the purpose of hiding the real identities of the victims.<sup>269</sup>

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<sup>267</sup> *Ibid.*, p. 18.

<sup>268</sup> *Ibid.*, p. 2.

<sup>269</sup> *Ibid.*



The first report issued by the Commander of the Seventh Military Zone established that both students were members of the organized crime and were on-board of the vehicle that attacked the combatants and, therefore, the combatants killed them during the collision. According to the members of the armed forces that were present during the clash, the students came out of the vehicle with firearms and ran towards the ITESM premises to escape from them.<sup>270</sup>

However, all the statements given by SEDENA, the Seventh Military Zone and the combatants that were present at the confrontation were proved to be false. There was enough evidence, eyewitnesses like the security guards of campus, testimonies of other students, the videotape from the security camera and, importantly, the personal and academic background of the students which by all accounts proved that they were excellent students. All of the evidence contradicted the authorities report. The evidence gathered by the CNDH and the ITESM proved Javier and Jorge were respectively a PhD and master's student from the ITESM that used to stay late to study at the Campus. Along with additional evidence, it was confirmed they were not part of the organized crime and the videotapes from the Campus corroborated they did not possess firearms as claimed by SEDENA members.<sup>271</sup>

Mexico's judiciary system has proved to be weak and this has allowed the security forces to enjoy certain immunities and protection by special jurisdictions which have ended in an unbearable impunity that governs the country. In principle, members of the armed forces are trained to abstain from using excessive public force save when it is strictly necessary and inevitable. However, the arbitrary use of force by the armed forces has become a standard practice. More seriously, it has become a common practice to excessively use force in public spaces where civilians can easily be injured.

Although the Military's Manual on the Use of Force (the Manual) was published in 2014, the military personnel do not always follow the rules on the correct use of firearms. For example, the manual establishes the prohibition to shoot at moving vehicles because it amounts to an excessive use of lethal force.<sup>272</sup> Nevertheless, the members of the armed forces tend to engage in high intensity violent confrontation without taking into account whether there is an imminent risk to third parties as it was the case with Javier and Jorge. In addition, there were other grave violations

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<sup>270</sup> *Ibid.*, p. 24.

<sup>271</sup> *Ibid.*, p. 20.

<sup>272</sup> Manual del Uso de la Fuerza, de aplicación común a las tres Fuerzas Armadas (The Military's Manual on the Use of Force). Secretaría de la Defensa Nacional, Secretaría de Marina, e.i.f. 22.05.2014, Mexico, p. 12 para. 14a.

regarding the manipulation of the scene and the evidence. For example, the Manual states that in case civilians are injured or dead as a result of a confrontation, the military personnel must abstain from altering the scene so as to ensure the reality of the events. However, there was a breach of that provision as the combatants manipulated the bodies and placed firearms to implicate the students in criminal activities and in that way, they were able to justify the executions.

Regarding the investigation, Article 21 of the Constitution enshrines that investigation of crimes is under the responsibility of the Public Prosecutor's Office. In this case there was no justification for the evidence to have been handed over to military personnel.<sup>273</sup> Only a small amount of the cases of civilians who die at the hands of members of the Mexican army are investigated in the ordinary criminal jurisdiction. This is due in part to the fact that, as a standard practice, agents of the Federal Public Ministry and the local Public Ministry refer the cases of deaths in which combatants are involved to the military justice system, claiming that they may be the consequence of the arbitrary use of force by the members of the armed forces.<sup>274</sup> Even if Article 13 of the Constitution prohibits the military tribunals to have jurisdiction over civilians, the Mexican army continues to invoke its right to investigate and prosecute murders and other serious human rights violations committed by the military against civilians, on the basis of Article 57 of the Code of Military Justice.<sup>275</sup>

Even though in March 2018 six combatants were placed under investigation and three imprisoned as a result of the execution, until this day, SEDENA has not recognized its responsibility on the deaths of Javier and Jorge and has not compensated the families of the victims. Extrajudicial executions in time of peace are considered a crime against humanity if perpetrated as part of a generalized attack against the civilian population endorsed by the state.<sup>276</sup> Therefore, Mexico as a state party to the Rome Statute is failing its obligations to prevent and to punish crimes against humanity.

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<sup>273</sup> See the Constitution of Mexico.

<sup>274</sup> Ni Seguridad, Ni Derechos, Ejecuciones, Desapariciones y Tortura en la “Guerra contra el narcotráfico” de Mexico, Human Rights Watch, p. 192.

<sup>275</sup> See the Code of Military Justice.

<sup>276</sup> See the Rome Statute. e.i.f. 01.07.2002.

### 3.2.3. Arbitrary Detention and Torture

The prohibition of torture as stated in human rights treaties enshrines an absolute right. This implies there are not permissible limitations of the prohibition of torture since it is considered as peremptory norm (*Jus Cogens*).<sup>277</sup> Despite the fact that torture is prohibited under international law and national laws in Mexico, arbitrary detentions occur every day being often the onset for gross human rights violations such as torture and other ill-treatment.<sup>278</sup> Since decades ago, police forces and the armed forces have been carrying out detentions claiming that the suspects are caught in *flagrante delicto* or showing suspicious behavior. This explanation is often given to make obscure actions look legitimate, commonly without any further proof. At the same time, detentions allegedly in *flagrante delicto* convey an impression that authorities live up to their responsibilities in the fight against crime.<sup>279</sup>

These forms of detentions are recurrent among members of the armed forces. For example, from December 2006 to April 2011 the army detained around 31,000 individuals in operations against drug-trafficking.<sup>280</sup> A standard practice is often observed in which *flagrante* detentions are carried out without giving an immediate explanation for the reason for the detention or any specific information about the legal situation of the detainee. Besides, a long delay is common before the individuals are brought before the competent authorities. Also, the authorities frequently do not identify themselves at the time of the detention. In practice, the anonymity of the authorities and the unjustified delays are oftentimes an excuse to plant evidence, and hence, to evade the responsibility to conduct a legitimate investigation into crimes that have been actually committed. Detainees are also constrained to provide information or confessions to crimes that often they have not committed by means of torture or other ill-treatment.

It needs to be emphasized that all those rights that are repeatedly denied to the detainees are protected under international law and the Mexican Constitution, meaning that the authorities are obliged to protect the citizens' rights at all times. However, in practice these rights are oftentimes

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<sup>277</sup> Case *Prosecutor v. Furundžija*, Trial Chamber, Judgment, ICTY, 10.12.1998, para. 144.

<sup>278</sup> According to the data of a survey elaborated by the INEGI, 59% of the people who were arrested declared to suffer aggressions during the detention. La nueva justicia penal en México: Avances palpables y retos persistentes. World Justice Project Mexico, p.8. Accessible: [https://worldjusticeproject.org/sites/default/files/documents/wjp\\_nueva\\_justicia\\_penal\\_MX\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/wjp_nueva_justicia_penal_MX_0.pdf)

<sup>279</sup> False Suspicions, arbitrary detentions by police in Mexico. Amnesty International, London, 2017, p. 4.

<sup>280</sup> Ni Seguridad, Ni Derechos, Ejecuciones, Desapariciones y Tortura en la “Guerra contra el narcotráfico” de Mexico, Human Rights Watch, p. 70.

not respected.<sup>281</sup> The inability to comply with such major human rights standards demonstrates the deficiencies in Mexican democratic system.

Mexico has ratified important conventions against torture, such as the United Nations Convention Against Torture (UNCAT)<sup>282</sup> and the IACPPT, and in 2017, The General Law to Prevent, Investigate and Punish Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Law against torture)<sup>283</sup> entered into force. In spite of that, conventions and national laws cannot be deemed as the only factor needed to eradicate torture and other ill-treatment. There is a need for solid institutions free of corruption, stronger public policies and programs regarding detention and the use of force, as well as to implement deterrent measures to prevent other similar violations. Also, political will is crucial to fully implement the laws and enhance accountability framework. These elements are vital to prevent further human rights violations. This section will now focus on the description and analysis of a case submitted to the CNDH concerning the arbitrary detention and torture of Maria Magdalena Saavedra.

On May 10, 2013, in San Luis Potosi, Mexico, Maria Magdalena Saavedra (Magdalena) was at her home when around five members of the armed forces from the Secretariat of the Navy (SEMAR) broke into her home. The combatants threatened her, hit her in the head, tied her hands and blindfolded her.<sup>284</sup> Then, they continued to torture her, and while they were beating her, they accused her of being the Gulf Cartel accountant. The combatants were demanding information about money and other related matters but, clearly, Magdalena did not know what those questions were about because her actual profession was as a manicurist in a beauty salon. Since she was not giving the information asked, the combatants asphyxiated her by placing a plastic bag on her head three times until she fell unconscious. Later, the combatants woke her up with blows while they verbally insulted her. Subsequently, they arbitrarily arrested her and forced her into a truck where they kept beating her during the whole journey.<sup>285</sup>

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<sup>281</sup> False Suspicions, arbitrary detentions by police in Mexico. Amnesty International, p. 5.

<sup>282</sup> The United Nations Convention Against Torture. Adopted 04.02.1985. e.i.f. 26.06.1987.

<sup>283</sup> Ley General para Prevenir, Investigar y Sancionar la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes. The General Law to Prevent, Investigate and Punish Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. e.i.f. 26.06.2017.

<sup>284</sup> Recomendación no. 20 /2017 sobre el caso de la detención arbitraria, retención ilegal, actos de tortura y violencia sexual en agravio de v1 y v2, en el Estado de San Luis Potosí. Comisión Nacional de Derechos Humanos, Ciudad de México, 30.05.2017, p. 6.

<sup>285</sup> *Ibid.*, p. 7.

At one point they arrived at an illegal detention site where they placed her on a chair, then the combatants took off her pants and underwear and proceeded to give her electric shocks in her genitals, crotch, stomach, bellybutton and mouth. While the combatants interrogated Magdalena to extract information about the money and other related matters, they continued to torture her. Eventually, she lost consciousness but when she recovered, the torture continued with electric shocks now on her feet and behind her ears.<sup>286</sup>

As Magdalena could not provide the information wanted, she was flipped against the back of the chair and sexually assaulted with an object by inserting it into her anus. Besides the physical and sexual torture, the combatants psychologically abused her by telling that they had her daughters' addresses and threatened her to do the same to them and kill her son if she did not cooperate. In fear, Magdalena agreed to confess to be part of the organized crime so they would not hurt her family.<sup>287</sup> In that moment they took her to another room where there was a table full of firearms and drugs, one man and one woman who had also been arbitrarily arrested by the SEMAR, and coerced Magdalena to confess that she was part of the organized crime and those firearms and drugs belonged to her and to the other two persons in the room.

Later, they took the three victims to the Attorney General's Office in Mexico City and Federal Public Ministry where Magdalena, in fear, opted to confess and accept all the criminal charges she was accused of. While in custody Magdalena expressed that she was bleeding from her vagina and anus as a result of the injuries inflicted by the members of the armed forces but the clinician that checked her at the Public Ministry stated that "she was okay and did not have any visible injuries".<sup>288</sup>

On May 20, 2013, the Court in Nayarit, found Magdalena guilty on the following charges: being part of the organized crime; stockpiling of weapons; possession of weapons; possession of cartridges for weapons for the exclusive use of the army, the navy or the air force; possession of cocaine for commercial purposes and use of resources of illegal origin.<sup>289</sup>

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<sup>286</sup> *Ibid.*, p. 8.

<sup>287</sup> *Ibid.*

<sup>288</sup> *Ibid.*, p. 9.

<sup>289</sup> *Ibid.*, p. 14.

During the time of the arrest, SEMAR was working under the framework of operations of the Security Team in the ongoing fight against drug-trafficking and other illicit activities.<sup>290</sup> According to SEMAR, Magdalena was arrested because of her alleged suspicious behavior that led to an anonymous tip received at the Operation Base of San Luis Potosí. After more than five years in prison, on November 9, 2018 Magdalena was released because the judge declared there was not enough evidence to convict her.

As a fundamental principle of international law, *Jus Cogens* establishes specific obligations for the states. Those obligations, besides being enshrined in the UNCAT, are also considered being of a customary nature meaning all the states must adhere to them. There are two types of obligations for the state, the negative obligation not to torture, and the positive obligation to investigate, prosecute and punish those responsible for acts of torture or physical, mental or sexual abuse.

Acts of torture or other ill-treatment are persistent and generally common in detentions where the security forces try to implicate the individuals with the organized crime, like the case of Magdalena. Torture epidemic continues and is systematic in Mexico, therefore, it can be argued that the state is failing to keep up with its international obligation to protect its population against this crime. For example, there is an alarming number of detainees that were interviewed in the Federal Investigation Center alleging to have suffered from torture and ill-treatment since the moment of the detention until they were brought before the respective authorities.<sup>291</sup> Since the moment of the detention, Magdalena suffered physical torture and was sexually and mentally abused. She was beaten, asphyxiated, insulted, threatened, and denied of proper medical care. Magdalena's life was seriously endangered because of the inadequate medical care she received. Her medical report did not document obvious signs of torture, but instead it minimized the seriousness of her wounds.

In 2003, the PGR became the first institution in the world that started to implement the Istanbul Protocol on a daily basis.<sup>292</sup> The Istanbul Protocol establishes minimum standards that need to be considered throughout the medical and psychological evaluations when seeking to detect whether a person has been tortured.<sup>293</sup> However, based on the report and the evidence it is possible to say that the authorities and the medical personnel were unaware on how to apply the standards set forth

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<sup>290</sup> *Ibid.*, p. 10.

<sup>291</sup> Between 2006-2014 the CNDH received 11,608 complaints of torture and ill-treatment. *La Tortura en México: Una Mirada desde los Organismos del Sistema de Naciones Unidas*, p. 26 para. 24.

<sup>292</sup> R. Loewe. *Tortura: Pensamiento y Acción del Colectivo Contra la Tortura y la Impunidad*. Colectivo Contra la Tortura y la Impunidad, Mexico, 2009, p. 110.

<sup>293</sup> See Istanbul Protocol. e.i.f. 2004.

in the Istanbul Protocol during the medical examination of Magdalena. This is an indication that the state has to endeavor to improve the qualification of the clinicians who conduct the evaluations in order to get an effective documentation of the torture and consequently the acknowledgement of the state responsibility for the victims.

On the other hand, the state failed to comply with the positive obligation to investigate, prosecute and punish the culprits. Magdalena spent five years in prison for a crime she did not commit because the judge and the prosecutors did not carry out a prompt, independent and effective investigation. More importantly, investigation and prosecution of those responsible for the violations are essential because impunity promotes the recurrence of human rights violations. Moreover, the majority of torture cases are not investigated and remain unpunished because oftentimes torture is not classified as a crime but as a less serious misconduct. Pursuant to the Law against torture, it is considered a crime to use torture or inhumane methods to extract confessions.

Also, in practice there is a so-called exclusionary rule which is regarded as a norm of customary international law that envisages an absolute prohibition on the use of statements obtained under torture or other ill-treatment in any proceedings.<sup>294</sup> The use of tainted evidence in judicial proceedings, such as confession extracted under duress, has become a routine, and in practice it is very common that the exclusionary rule is not upheld. As demonstrated in this case, Magdalena's confession was obtained under torture and even if the physical signs corroborated it, the judge willingly admitted the confession without questioning if the evidence presented by the prosecutor during in the proceedings was in fact obtained by legal means. Consequently, the admission of the forced confession constituted a violation of Magdalena's right of due process and a fair trial.

Since the armed forces were deployed to combat organized crime, their array of competence increased in relation to the powers to make arrests, detentions or investigations. This has undermined the safeguards against human rights violations and, moreover, promoted abuse and impunity. In this particular case no one has been held accountable for the crimes committed against Magdalena being another proof of incompatibility of military forces in upholding public security.

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<sup>294</sup> J. E. Méndez. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Human Rights Council, United Nations General Assembly, 01.02.2013.

## CONCLUSION

The use of the armed forces in law enforcement in Mexico has led to retreat from fundamental democratic principles, such as democratic checks and balances and separation of powers. The failure to respect these key principles has seriously harmed the system of protection of human rights. Even though Mexico has strengthened the legal framework of the protection of human rights, these measures have proven difficult to enforce as the state does not meet the key democratic standards.

While the military deployments were initially introduced as temporary by President Calderón, thirteen years later the armed forces are still in charge of public security. The presence of combatants in the streets for the last decade has not achieved its goal of dismantling and destroying the drug cartels and neither has it accomplished the promise to reduce crime and violence. Conversely, the strategy has had severe unintended consequences. The deployment of combatants has been a key factor in the substantial rise in homicides. Besides, members of the armed forces have an alarming track record in human rights abuses. Since the armed forces were mandated to carry out public security tasks in the absence of a legal framework and essential safeguards, it created a fertile soil for systematic human rights violations on the civilian population that have since been committed.

The three cases of human rights violations analyzed in chapter III indicate a systematic failure to protect human rights in the realm of public security since members of the armed forces were commanded to undertake public security tasks. The cases elucidate various abuses, such as enforced disappearances, extrajudicial executions, arbitrary detentions and torture, which constitute the main violations perpetrated by the armed forces. These violations are unquestionably in breach with fundamental rights guaranteed under constitutional and international law. The right to life, the right to humane treatment and the right to personal liberty are imperative among those rights. Moreover, other rights, such as the right to a fair trial, right to compensation and the right to judicial protection, have also been consistently violated by the state authorities.

The lack of genuine measures of non-repetition against military abuses has contributed to the current climate of impunity to a great extent given that the military personnel are hardly ever held



accountable for their crimes. The current practice allows the combatants to commit crimes and conduct illegal activities with the acquiescence of the state. Based on the cases and the analysis of the legal system, it can be concluded that the members of the armed forces are committing grave violations against civilians because there is no effective control by civilian authorities over the armed forces. Even though the Constitution prohibits the military tribunals to have jurisdiction over civilians, the Mexican Army continues to invoke its right to investigate serious human rights violations committed by its personnel against civilians on the basis of the Code of Military Justice, i.e. military jurisdiction, seriously harming the principle of separation of powers.

As argued in chapter III, classifying the victims as collateral damage or as being part of the organized crime has become a common practice by the authorities. This conduct has served as a pretext for the authorities to not take responsibility for their actions. Consequently, this behavior has made it apparent that the state is failing to keep up with its international obligation to prevent and to punish crimes against humanity.

Throughout the years, numerous homicides and human rights violations have been attributed to the authorities, to a large extent due to the arbitrary use of force by the armed forces. One of the key reasons is that the members of the armed forces are trained to combat the enemy through the use of force. It has been long discussed among international organizations, academics and experts that the training received by combatants is incompatible with the expected training for someone interacting with civilians. The military training is not suitable in civilian law enforcement in most cases because it can lead to grave human rights violations. As a consequence, civilian police forces must be the ones responsible for the application of laws and public stability.

On top of that, the cases studied in the thesis also demonstrate that the military is one of the least transparent and least accountable institutions. Widespread corruption that is deep-rooted in the system contributes to opacity. The military information is considered confidential and so the access to it is strictly restricted. For increasing the accountability, the state must continue reforming several areas, for example, by advancing solid and transparent institutions free of corruption and applying stronger public policies.

The cases of human rights violations described in the thesis are not isolated but describe a common practice where the authorities do not carry out effective investigations, where the crime scenes are manipulated in order to erroneously incriminate the victims as armed assailants or as part of the

organized crime or where the victims are arbitrarily arrested without any grounds for their arrest. All these failures can be attributable in some part to the illegal practices and malfunctions that undermine the criminal justice system.

A major reform in the criminal justice system was undertaken in 2008, as described in chapter II, leading to the transition from a mixed inquisitorial criminal justice system to an adversarial accusatory system. The accusatory system was set to be fully implemented by 2016 throughout all the states of the country. The new criminal justice system offered many positive changes and it could be a beacon of hope if implemented well. Reforming the criminal justice system and trying to strengthen the judiciary has clearly been a step in the right direction. Yet, the effective functioning of the system is improving very slowly. Proper training has not been made available for all the agents that work under the new justice system. The law enforcement institutions remain weak and ineffective. Also, as proved by the cases, bad practices of the judges, prosecutors and defenders continue to hinder the implementation of the new justice system.

The state has allocated more resources for the military in the last decade because the armed forces are considered more qualified than the police forces for the fight against organized crime. This claim might be correct in the sense that civilian police are not capable of fighting against well-equipped drug-trafficking organizations. In general, civilian forces are responsible for the application of laws and public stability and are not provided with high-caliber weapons. As the security situation in Mexico is complex, the armed forces could indeed play a role in assisting the police in certain operations against the high-powered criminal organizations. Nonetheless, the experience so far has proven that the use of the armed forces lacks necessary safeguards that would prevent the violations of human rights. Creating a legal framework that would establish a specific and limited role for the armed forces in the realm of public security is critical.

The thesis demonstrates that deficiencies in the democratic system can harm the effective protection of human rights. The democratic system in Mexico has been too weak to establish essential checks and balances for avoiding human rights abuses. While gradual improvements have taken place, many challenges remain. More robust systems of separation of powers, checks and balances and a dynamic civil society are prerequisites for becoming a strong democracy. Sufficient improvements are unlikely to take place in the years to come which is why the realities of a semi-democratic system have to be considered when evaluating the options for the use of the armed forces in public security tasks.

The new administration of Mexico has an urgent need to either integrate the armed forces legally in the public security system subjecting them to civilian control or look for viable alternative strategies in the fight against crime. So far the creation of a National Guard, an armed force of civil nature, has been proposed, as analyzed in chapter II. The President declared that the aim of the National Guard is the gradual demilitarization of the country by withdrawing the armed forces that are currently undertaking tasks of public security. However, for the National Guard to function, several reforms are needed. First and foremost, effective civilian control as well as accountability mechanisms must be in place. The new public security plan should not disregard the local police forces but instead more resources should be allocated to prepare them for effectively fighting against crime.

Given the substantial flaws within the democratic system highlighted above, the study does not find support for the hypothesis set up in the thesis. On this account, the use of the armed forces in civil law enforcement is incompatible with the system of protection of human rights, even if a legal framework would be created. The weaknesses in the current democratic system undermine the effectiveness of legal safeguards that could prevent violations of human rights by the members of the armed forces. Hence, it is likely that the use of armed forces in police tasks would continue to lead to systematic human rights violations. As a result, law enforcement must undergo major changes in Mexico in the near future. Mexico is a signatory of numerous human rights treaties and has issued several laws concerning the protection of human rights. More importantly, it has implemented important constitutional reforms that established the foundation for implementing international human rights standards and incorporating them into domestic law in Mexico. The reforms have strengthened the framework of rule of law, in conformity with national and international law and in line with the separation of powers. In practice however, many loopholes have allowed the military and civil authorities, politicians and others to avoid the enforcement of the law. The national laws are to a large extent adequate – as discussed in the thesis there are some laws that require further reforms – implementation and enforcement, however, lag often way behind.

Outlining a detailed roadmap on how to solve the public security crisis in Mexico clearly falls beyond the ambit of this thesis. Instead, the thesis demonstrates that prolongation of the unrestricted use of the armed forces in public security tasks would lead to the continuation of human rights abuses and a further departure from legal obligations of Mexico. When the armed forces are

mandated with the principal role in law enforcement in a semi-democratic country, it results in a tradeoff between fighting against criminal activity more effectively and harming the structures of human rights protection. The war on drugs has not yielded expected outcomes in more than a decade, and yet it has engendered long-term harm to the protection of human rights. In these circumstances, a relatively fast but orderly departure of the armed forces from primary tasks of law enforcement is strongly recommended. This has to be coincided with a sharp increase in resources to bolster regular police forces. A timeline of several years for the complete overhaul of the current policy is likely to be necessary for avoiding serious disruptions in law enforcement. While the general goal of demilitarization of the proposed National Guard is in line with this recommendation, there is no indication that any swift changes are planned. The long-term implications of such policy on the system of protection of human rights are likely to be even more destructive.

Given that the path towards creating a strong democracy in Mexico will unlikely be a short one, the armed forces should not be charged with the primary role in the fight against drug cartels, even if a strong legal framework would be created. Therefore, the use of the armed forces in law enforcement should be strictly limited. The civil forces should be responsible for law enforcement, including the fight against drug cartels. Yet, the armed forces could play an auxiliary role, such as operational planning, intelligence, or logistics. In case of high-intensity operations against drug cartels, the use of the armed forces could also be conceivable because of the lack of capacity within civilian police. This involvement, however, should be a decision at the discretion of a civilian authority. The basis for such involvement could only be a transparent legal framework. The latter combined with an effective system of checks and balances is necessary to avoid overusing the resources of the armed forces which may induce unintended consequences, particularly in the form of harming the system of human rights protection.

## ABBREVIATIONS

ACHR	The American Convention on Human Rights
CNDH	National Human Rights Commission
IACPPT	The Inter-American Convention to Prevent and Punish Torture
ICCPR	The International Covenant on Civil and Political Rights
IHL	International Humanitarian Law
IHRL	International Human Rights Law
INAI	Mexico's National Institute for Transparency, Access to Information and Protection of Personal Data
INEGI	Mexico's National Institute of Statistics, Geography, and Information
ISL	The Internal Security Law
ITESM	Monterrey Institute of Technology and Higher Education
Law against torture	Law to Prevent, Investigate and Punish Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
NIAC	Non-International Armed Conflict
OAS	Organization of American States
OHCH	The Office of the United Nations High Commissioner for Human Rights
PAN	National Action Party
PGR	The Attorney General of the Republic
PRI	Institutional Revolutionary Party
SEDENA	The Secretariat of National Defense
SEMAR	The Secretariat of the Navy
The Commission	The Inter-American Commission on Human Right
The Inter-American	
Court	The Inter-American Court of Human Rights
The Manual	The Military's Manual on the Use of Force
UN	United Nations
UNCAT	The United Nations Convention Against Torture

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## ANNEXES

### ANNEX 1. Types of accountability<sup>295</sup>

		Who controls?	Mechanisms for controlling politicians	Mechanisms for controlling bureaucrats
Horizontal		Executive Branch	– Veto	– Policy Setting – Regulation – Administrative Oversight – Nomination and Demotion of Personnel
		Legislative Branch	– Impeachment – Investigative Commissions – Veto Override	– Policy Setting – Regulation – Administrative Oversight – Nomination and Demotion of Personnel
		Judicial Branch	– Judicial Review	– Judicial Review
		Oversight Agencies	– Enforcement Power – Investigative Power	– Enforcement Power – Investigative Power
Vertical	Electoral	Political Parties	– Political Representation – Policy Setting	– Regulation – Policy Setting
		Citizens	– Vote	
	Societal	Civic Associations, NGOs, Social Movements	– Social Mobilization and Public Exposure – Investigation by Oversight Agencies – Agenda Setting – Demonstrations	– Social Mobilization and Public Exposure – Investigation by Oversight Agencies – Agenda Setting
		Media	– Exposure – Litigation	– Exposure – Litigation
		Ombudsmen	– Investigation and Public Exposure – Agenda Setting	– Investigation and Public Exposure – Agenda Setting

### ANNEX 2. Civil Society relations with the state<sup>296</sup>

Self-Organization	Dependent	Autonomous
Demand Making		
Institutionalized	Affirmative democracy	Mobilized democracy
Discretionary	Prostrate democracy	Bifurcated democracy
Excluded	Totalitarianism	Authoritarianism

<sup>295</sup> C. Smulovitz, E. Peruzzotti. Societal Accountability in Latin America. –11(4), Journal of democracy, 2000, p. 153.

<sup>296</sup> Baiocchi, Heller, *op. cit.*, p. 35.

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**30/04/2019**